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Sup. Ct

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 148

EDGAR S. ALBRECHT AND GERALDINE ALBRECHT, HIS WIFE, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 149

EDWARD J. LINNENBRINGER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 150

DENNIS B. PITMAN AND MAY DELL PITMAN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

No. 155

Q. W. S. S. REALTY AND INVESTMENT COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 7 AND JUNE 8, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 13,223

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

EDGAR S. ALBRECHT, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 12, 1945

No. 13,226

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

Q. W. S. S. REALTY AND INVESTMENT COMPANY A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 21, 1945.

No. 13,227

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

EDWARD J. LINNENBRINGER, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 21, 1945.

No. 13,228

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

DENNIS B. PITMAN, ET. AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 21, 1945.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the March Term, 1946, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 12th day of December, A. D. 1945, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America was Appellant and Edgar S. Albrecht, et al., were Appellees, and thereafter on the 21st day of December, A. D. 1945, transcripts of records pursuant to appeals taken from the District Court of the United States for the Eastern District of Missouri, were filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the United States of America was Appellant and Q. W. S. S. Realty and Investment Company, a Corporation, was Appellee, the United States of America was Appellant and Edward J. Linnenbringer, et al., were Appellees, and the United States of America was Appellant and Dennis B. Pitman, et al., were Appellees, which said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, are in the words and figures following, to-wit:

Notice Of Appeal.

(Filed Nov. 27, 1945.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,

Docket No. 820. vs. At Law.

59.11 Acres of land, more or less, situate in the County of St. Charles, State of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., Defendants.

Notice is hereby given that the United States of America, Plaintiff in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final Judgment entered in this cause on the 29th day of June, 1945.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 27th day of November, 1945.

[fol. 2] Docket entry showing filing of notice of appeal and mailing copy of such notice to attorneys of record for defendants.

(November 27, 1945.)

Notice of appeal of plaintiff to the United States Circuit Court of Appeals, 8th Circuit from final judgment entered herein June 29, 1945 filed and copies of aforesaid notice forthwith mailed by the Clerk of the Court to George Eigel, Esq., atty. of record for defts. Albert W. Albrecht, Jr., et al., and to Robert P. Elam, Esq., attorney of record for defts., Edward S. Albrecht, et al.

[fol. 3] (Clerk's Docket Entries of case No. 820.)

United States Of America, Plaintiff,
Docket No. 820. vs. At Law.
59.11 Acres of land, more or less, situate in the County Of St. Charles, State Of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., Defendants.

4- 9-41 Motion of plaintiff for leave to file petition in condemnation and for order for summons filed and presented and granted in order filed and entered; petition in condemnation filed and summons issued directed to defendants, returnable May 26, 1941; on oral motion of plaintiff, order and judgment filed and entered on Declaration of Taking filed April 7, 1941 in Cause No. 770, vesting fee simple title in plaintiff as to tract designated herein and directing delivery of immediate possession to plaintiff; order filed and entered directing notice be given to defendants of judgment on Declaration of Taking and of requirement for immediate delivery of possession to plaintiff; on oral motion of U. S. Attorney, order filed and entered directing transfer of $2,232.00 to this cause for the use and benefit of defendants entitled thereto from sum heretofore deposited by plaintiff in Registry under Declaration of Taking filed in said Cause No. 770, being estimated compensation for said Tract No. 245, herein.

5-26-41 Marshal's Return of service to summons and order filed. (Executed).

5-26-41 By agreement, defendants Edgar S. and Geraldine Albrecht granted to June 23, 1941 in which to plead.

5-26-41 Order filed and entered continuing cause to June 16, 1941.

5-26-41 On oral application defendants Albrecht W. Albrecht, Jr., and wife granted 20 days additional time within which to plead.

6-16-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to June 30, 1941.

6-16-41 On oral motion, defendants A. W. and Virginia Albrecht granted 10 days additional time within which to plead to plaintiff's petition in condemcondemnation, filed.

6-23-41 By leave of Court and by agreement of counsel, defendants Edgar S. and Geraldine Albrecht granted to June 30, 1941 in which to plead.

6-30-41 Order filed and entered continuing cause to Sept. 15, 1941.

[fol. 4] 6-30-41 Upon oral application, defendants Albert W. Albrecht, Jr., and Virginia Albrecht granted 10 days additional time within which to plead.

7- 2-41 Answer of defendant Edgar S. Albrecht and Geraldine Albrecht to plaintiff's petition in condemnation, filed.

7-12-41 Upon oral application of U. S. Attorney, order filed and entered granting plaintiff 30 days from date in which to plead to answer filed by defendants Edgar S. Albrecht and Geraldine Albrecht.

9- 4-41 Answer of defendants Albert W. Albrecht, Jr. and Virginia Albrecht to plaintiff's petition filed by leave.

9-15-41 On oral motion of plaintiff, order filed and entered granting plaintiff leave to amend petition in certain respects; order filed and entered continuing cause to October 14, 1941.

10-14-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to Nov. 3, 1941.

11- 3-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to Jan. 14, 1942.

1-14-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to April 30, 1942.

4-30-42 Upon oral motion of U. S. Attorney, order filed and entered continuing cause to June 3, 1942.

6- 3-42 Upon oral motion of U. S. Attorney order filed and entered continuing cause to July 15, 1942.

7-15-42 Order of Hon. Charles B. Davis continuing cause upon oral motion of the U. S. Attorney to September 8, 1942, received, filed and entered.

9- 8-42 On oral motion of U. S. Attorney, order filed and entered continuing case to December 8, 1942.

12- 7-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to January 13, 1943.

1-13-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to April 13, 1943.

4-13-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to Oct. 13, 1943.

10-13-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to March 7, 1944.

3- 7-44 On oral motion of U. S. Attorney, order filed continuing cause to June 6, 1944.

6- 6-44 On oral motion of U. S. Attorney, order filed continuing cause to Dec. 4, 1944.

[fol. 5] 12- 4-44 On oral motion of U. S. Attorney, order filed continuing cause to March 5, 1945.

3- 5-45 On oral motion of U. S. Attorney, order filed continuing cause to May 7, 1945.

3-30-45 Motion of plaintiff for judgment in condemnation and judgment for defendants fixing compensation by optlon filed.

3-31-45 Claims of plaintiff in its own behalf and for Collector of Internal Revenue for the Sixth Collection District of Missouri, asserted against any disbursement herein from Registry awarded to R. Newton McDowell, by reason of certain liens, interest and penalties thereon, filed.

4- 2-45 On oral motion of U. S. Attorney, order filed and entered setting for hearing on May 7, 1945, the motion of plaintiff heretofore filed for judgment in condemnation and for judgment for defendants fixing compensation by option; directing plaintiff give notice by mail of such hearing

to defendants, their attorneys and R. Newton McDowell and The Kansas City Title Insurance Company, and by posting notice thereof, etc.

4- 4-45 Affidavit as to mailing of notice to defendants and other parties in interest of date of hearing of plaintiff's motion for judgment in condemnation and for judgment for defendants fixing compensation by option filed by plaintiff.

4-16-45 Clerk's Return to posted notice filed.

5- 2-45 Answer of defendants Edgar S. Albrecht, et al. to plaintiff's motion for judgment in condemnation and fixing compensation by option without interest, and motion of said defendants for judgment with interest, filed.

5- 5-45 Claim of intervening defendant Kansas City Title Insurance Company filed.

5- 7-45 Motion of plaintiff for judgment for plaintiff in condemnation and for defendants fixing compensation by option and on responsive pleadings thereto, and counter-motions of defendants for payment of interest, taken as submitted.

5-17-45 Plaintiff tenders into Court to the use and benefit of persons entitled thereto, deficiency in the sum of $19,193.00, which sum is deposited by the Clerk in the Registry.

6- 7-45 Supplemental claim of U. S. asserted against any payment herein to R. Newton McDowell, filed.

6-22-45 Memorandum opinion of the Court filed finding issues in favor of defendants and against plaintiff; directing appropriate judgment be submitted in this case respecting the payment of interest, and directing counsel to submit orders ruling on various motions and counter-motions; all in accordance with said opinion, for approval, signature and entry.

[fol. 6] 6-29-45 Findings and judgment filed and entered awarding plaintiff judgment in condemna-

tion as well as judgment for defendants fixing compensation by option, with interest, etc.

7- 7-45 Motion of plaintiff for new trial, filed.

8- 9-45 Amended claim of the United States of America, filed.

8-14-45 Motion of Reconstruction Finance Corporation to intervene, together with proposed intervening petition of said Reconstruction Finance Corporation, filed.

8-15-45 Motion docketed for hearing on August 15, 1945 passed to next regular motion day to be designated.

8-23-45 Order of Hon. R. M. Duncan fixing September 8 as time for filing intervening petitions and fixing September 11, 1945 as time for hearings thereof, received, filed and entered.

8-27-45 Affidavit of U. S. Attorney as to mailing a copy of notice to file intervening petitions respecting claim to money on deposit in the Registry of the Court, filed.

8-28-45 Petition of defendants Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht for distribution of amount on deposit in the Registry of the Court, filed.

9- 4-45 Claim of R. Newton McDowell filed.

9- 7-45 Clerk's return to posted notice filed.

9- 7-45 Motion of National Refining Co., to intervene, with proposed intervening petition attached, together with affidavit as to service of aforesaid motion to intervene, filed.

9-11-45 Intervening petition of R. Newton McDowell heard, submitted and allowed in the sum of 5% of option price. Intervening petition of Kansas City Title Insurance Company continued to October 5, 1945 at ten A. M. Cause submitted for entry of order of distribution to record owners subject to claim of Kansas City Title Insurance Company.

9-12-45 On oral motion of U. S. Attorney, motion of plaintiff for a new trial passed until further order.

9-14-45 Separate motions of National Refining Company and Reconstruction Finance Corporation to intervene sustained and separate intervening petitions of aforesaid parties thereupon filed. Winston H. Woodson, Esq., attorney for Globe Indemnity Company, and United States of America for and on behalf of Internal Revenue Collector of Sixth Collection District of Missouri granted ten days from this date within which to file intervening petition, herein.

[fol. 7] 9-27-45 Stipulation filed between defendant landowners Edgar S. Albrecht, et al., and Kansas City Title Insurance Company providing that sum of $321.38 be paid to said title company from funds on deposit in Registry, and upon such payment the claim of Kansas City Title Insurance Company to be dismissed with prejudice and said Company to immediately repay to the Treasurer of the U. S. title expenses in the sum of $36.00.

10- 5-45 Claim of Kansas City Title Insurance Company allowed at 1½% of option price pursuant to stipulation heretofore filed. Cause submitted for order of distribution to record owners.

10-16-45 Order of partial distribution filed and entered.

11-26-45 Motion of pltff. for a new trial submitted by pltff., taken as submitted by defts. and overruled.

11-27-45 Notice of appeal of pltff. to the USCCA, 8th Circuit from final judgment entered herein June 29, 1945 filed and copies of aforesaid notice forthwith mailed by the Clerk of the Court to George Eigel, Esq., atty. of record for defts. Albert W. Albrecht, Jr., et al., and to Robert P. Elam, Esq., attorney of record for defts. Edward S. Albrecht, et al.

12- 7-45 Appellant's designation of record and (2) statement of points to be relied upon on appeal, filed.

[fol. 8] (Motion of United States of America for Leave to File Petition in Condemnation and for Order for Summons.)

(Filed April 9, 1941.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 820. vs. At Law.
59.11 Acres of land, more or less, situate in the County of St. Charles, State of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., Defendants.

Tract No. 245.

Comes Now the United States of America by Harry C. Blanton, United States Attorney for the Eastern District of Missouri, and moves the Court for permission to file the above-entitled proceeding to condemn certain real estate as in said petition described and asks that this Court enter an order permitting the filing of said petition and directing summons to issue to the defendants named therein.

Respectfully submitted,

HARRY C. BLANTON,
United States Attorney.

(Order Granting Leave to File Petition in Condemnation and for Issuance of Summons, etc.)

Motion for leave to file the petition for condemnation in the above-entitled proceeding is granted and the petition ordered filed;

And It Is Hereby Further Ordered And Directed that the Clerk of this Court shall issue summons and notice to the defendants and each of them as named in the petition for condemnation filed in the above-entitled cause to appear before the Judge of this Court at the United States Court House in the City of St. Louis, State of Missouri, on the

26th day of May, 1941 at 10:00 in the forenoon, then and there to answer the petition of the United States of America and at which time and place said petition will be heard;

And It Is Hereby Further Ordered And Directed that inasmuch as this is a proceeding for the condemnation of property under the power of eminent domain, the procedure for the service of said summons and notice is not governed by Rule No. 4 of the New Rules of Civil Procedure for the District Courts of the United States; that said rule is not applicable to the service of such summons and notice; and that in the service of summons and notice herein, plaintiff is authorized to follow its former practice.

GEO. H. MOORE,
United States District Judge.

Dated this 9th day of April, 1941.

[fol. 9] Petition In Condemnation.

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 820. vs. At Law.
Tract No. 245.

59.11 Acres Of Land, More Or Less, Situate In The County Of St. Charles, State Of Missouri, Known as Tract No. 245, and

Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., Virginia Albrecht, Collector Of Revenue Of St. Charles County, Missouri, County Of St. Charles, State Of Missouri, Defendants.

[fol. 10] To The Honorable, The Judges Of The United States District Court For The Eastern District Of Missouri:

Now Comes, the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the au-

thority of the Attorney General of the United States pursuant to the request of the Secretary of War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Southeastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized and empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in fee simple absolute of the land hereinafter described and the title thereto, which real estate is located as aforesaid, and is authorized and directed to be brought by the [fol. 11] Secretary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257); and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940 (Public No. 667—76th Congress); and the Act of Congress approved September 24, 1940 (Publ. Res. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United States

and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

[fol. 12] Tract No. 245.

(A)

Tract No. 245, containing 59.11 acres of land, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

A tract of land located within Sections 34 and 35, Township 46 North, Range 3 East, described as follows: Beginning at an old stone at the southwest corner of the SE¼ of Section 34; thence North 12.254 chains to an iron pipe; thence East 32.544 chains to a point in the center of a County Road; thence along said County Road North 1 degree 45 minutes East 1.28 chains to an iron pipe; thence North 75 degrees 55 minutes East 12.47 chains to the center right of way line of Missouri U. S. Highway 40 TR; thence along center line of said right of way, South 17 degrees 28 minutes East 975 feet, more or less, to center line of right of way of the M. K. & T. Railroad Company; thence along the center line of said railroad right of way South 74 degrees 58 minutes West 13.12 chains more or less, to an iron pipe in the center of a county road; thence along the section line between Sections 3 and 34 West 34.39 chains to the place of beginning, situated in St. Charles County, Missouri, and containing 59.11 acres more or less, subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

subject also to right of way easement of M. K. & T. Railroad Company.

[fol. 13] (B)

That the following defendants own or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

Edgar S. Albrecht

Geraldine Albrecht

Albert W. Albrecht, Jr.

Virginia Albrecht

[fol. 14] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Collector of Revenue of St. Charles County, Missouri, are, therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands, each claim and assert, or may claim and assert a reversionary interest in and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and claimants to easements in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendants, as hereinabove specifically named, if known, and if unknown, such unknown persons

by the description of the "Unknown Owners" of the land herein described and to be condemned, to the end that they may come into Court and by proper pleadings make known their interests and claims to said land or to the proceeds arising therefrom;

Eleventh: That your petitioner has attempted to set forth the interest or estates of all persons, firms, and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporation having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that all of their [fol. 15] rights, title, interests and estate, whatever it may be, to all and singular, the premises above mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident defendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts apropos to this proceeding and the provisions of the law applicable thereto, under which this

action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants; that the Court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that these defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court, upon the filing of this petition, will make an order pursuant to [fol. 16] the Act of Congress approved February 26, 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servants, agents and employees may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interests therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief in the premises to which this petitioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney for the
Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri.

M. WALKER COOPER,
Special Assistant to the
United States Attorney,
410 New Federal Building,
St. Louis, Missouri.

[fol. 17] United States of America,
Eastern District of Missouri—ss.:

Before me, the undersigned, personally appeared Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the petition.

HARRY C. BLANTON.

Subscribed and sworn to before me, this 9th day of April, 1941.

JAMES J. O'CONNOR,
Clerk of U. S. District Court in and
for the Eastern District of Missouri.
(Seal) By Clare Redmond, Deputy.

Endorsed, filed Apr. 9, 1941, Jas. J. O'Connor, Clerk.

[fol. 18] Declaration of Taking.

(Filed April 7, 1941.)

In the United States District Court, in and for the Eastern District of Missouri.

United States of America, Petitioner,
No. 770. vs.
1,710.54 Acres of Land, More or Less, Situate in St. Charles County, State of Missouri, and Vincent Lonergan, et al, Defendants.

To the Honorable,
The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved July 2, 1917, as amended by the Act of Congress approved April 11, 1918 (50 U. S. C. sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act of Congress approved June 26, 1940 (Public No. 667—76th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for such other uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

[fol. 19] 2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject, however, to all existing rights for easements for public roads, pipe lines and public utilities, in, across and over the lands acquired.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 3rd day of April, A. D. 1941, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the
United States.

[fol. 20] Schedule "A".

The land which is the subject matter of this Declaration of Taking and of this condemnation aggregates 1,710.54 acres, more or less, situate and being in the County of St. Charles, State of Missouri. A Description of the lands taken, together with a list of the [purposted] owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

[fol. 21] Tract No. 245.

A tract of land located within Sections 34 and 35, Township 46 North, Range 3 East, described as follows: beginning at an old stone at the southwest corner of the SE¼ of Section 34; thence North 12.254 chains to an iron pipe; thence East 32.544 chains to a point in the center of a County Road; thence along said County Road North 1 degree 45 minutes East 1.28 chains to an iron pipe; thence North 75 degrees 55 minutes East 12.47 chains to the center right of way line of Missouri U. S. Highway 40 T[illegible]; thence along center line of said right of way, South 17 degrees 28 minutes East 975 feet, more or less, to center line of right of way of the M. K. & T. Railroad Company; thence along the center line of said railroad right of way South 74 degrees 58 minutes West 13.12 chains more or less, to an iron pipe in the center of a county road; thence along the section line between Sections 3 and 34 West 35.39 chains to the place of beginning, situated in St. Charles County, Missouri, and containing 59.11 acres, more or less.

Names of Purported Owners: Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht.

Estimated Compensation $2,232.00.

[fol. 22] The gross sum estimated to be just compensation for the lands hereby taken is $76,889.26.

[fol. 23] Order And Judgment On Declaration Of Taking.

(Filed April 9, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 820. vs. At Law.
Tract No. 245.
59.11 Acres Of Land, More Or Less, Situate In The County Of St. Charles, State Of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., Defendants.

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter a judgment herein on the Declaration of Taking filed in Case No. 770 on April 7, 1941, and upon consideration of said motion, and the condemnation petition filed herein, and the Declaration of Taking filed in said Cause No. 770, the Court having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land described in said petition, and also under authority of the Attorney General of the United States:

Second: That said Petition filed herein and the Declaration of Taking heretofore filed in Cause No. 770 state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United States of America, for the purposes therein set forth;

[fol. 24] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in the said Declaration of Taking;

Fourth: That the said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use:

Fifth: That a map or plan showing the land taken is annexed to and made a part of the said Declaration of Taking;

Sixth: That a statement is contained in the said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 245, in the amount of Two Thousand Two Hundred Thirty Two Dollars And No. Cents ($2,232.00), and that said sum was deposited in the Registry of this Court in Case No. 770 to the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking:

Seventh: That a statement is contained in the said Declaration of Taking that the amount of the ultimate award of compensation for Tract No. 245, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor,

It Is Therefore Ordered And Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of the said Declaration of Taking and depositing in the Registry of this Court of the aforesaid estimated compensation, which land is situated in St. Charles County, Missouri, and described as follows:

[fol. 24a] Tract No. 245, containing 59.11 acres of land, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

A tract of land located within Sections 34 and 35, Township 46 North, Range 3 East, described as follows: Beginning at an old stone at the southwest corner of the SE¼ of Section 4; thence North 12.254 chains to an iron pipe; thence East 32.544 chains to a point in the center of a County Road; thence along said County Road North 1 degree 45 minutes East 1.28 chains to an iron pipe; thence North 75 degrees 55 minutes East 12.47 chains to the center right of way line of Missouri U. S. Highway 40 TR; thence along center line of said right of way, South 17 degrees 28 minutes East 975

feet, more or less, to center line of right of way of the M. K. & T. Railroad Company; thence along the center line of said railroad right of way South 74 degrees 58 minutes West 13.12 chains more or ..s, to an iron pipe in the center of a county road; thence along the section line between Sections 3 and 34 West 35.39 chains to the place of beginning, situated in St. Charles County, Missouri, and containing 59.11 acres more or less, subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 25] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered And Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the en .y of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 9th day of April, 1941.

GEO. H. MOORE,
United States District Judge.

[fol. 26] Order Transferring Fund From The Declaration Of Taking In Case No. 770.

(Filed April 9, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 820. vs. At Law.
Tract No. 245.
59.11 Acres Of Land, More Or Less Situate In The County Of St. Charles, State Of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., Defendants.

It appearing to the Court that in the Declaration of Taking filed with Case No. 770 on April 7th, 1941, there was

paid into the Registry of the Court as estimated compensation for Tract No. 245, described in the petition filed herein, the amount of $2,232.00;

On oral motion of the United States Attorney, the Clerk of this Court is directed to transfer $2,232.00, of the whole amount deposited under the Declaration of Taking heretofore filed, to this cause for the use and benefit of the defendants entitled thereto as to Tract No. 245.

GEO. H. MOORE,
United States District Judge.

Dated, this 9th day of April, 1941.

[fol. 27] Separate Answer Of Edgar S. Albrecht And Geraldine Albrecht.

(Filed July 2, 1941.)

Now come Edgar S. Albrecht and Geraldine Albrecht, his wife, and for their answer to plaintiff's petition in condemnation deny that they were, at the time of the institution of this action or at any time since, the owners of the fee simple title to lands referred to in plaintiff's petition or that they claimed any title or interest therein, and deny that they were at said time, or at any time since, in possession of said land, of any of it, and assert that they had, long prior to the institution of this action, surrendered possession of said lands to plaintiff, pursuant to a valid contract between plaintiff and these defendants, as will appear more fully hereinafter.

Further answering, these defendants state:

That on and prior to the 9th day of December, 1940 they were, together with Albert W. Albrecht, Jr. and Virginia Albrecht, the owners of the fee simple title to 59.11 acres of land, more or less, situated in the County of St. Charles, State of Missouri, more particularly described in plaintiff's petition as Tract No. 245, which said descriptions are, by reference incorporated herein and made a part hereof as fully as if here set out in haec verba.

That one R. Newton McDowell solicited these defendants and Albert W. Albrecht, Jr. and Virginia Albrecht to sub-

[fol. 28] mit an offer for the sale of their said land to plaintiff and supplied to said defendants an instrument entitled "Option to Purchase Land." That on the 9th day of December, 1940, these defendants and Albert W. Albrecht, Jr. and Virginia Albrecht duly executed said instrument, in and by which they offered to sell to plaintiff the aforedescribed real estate for the sum of $21,425.00, returned the same to McDowell, who, in turn, delivered it to plaintiff. Thereafter, on the 17th day of December, 1940, the offer so made by defendants was duly accepted by and on behalf of the United States of America by C. J. Harrold, Major, Quartermaster Corps, United States Army, duly authorized to act for plaintiff in that connection.

That the contract created by said offer and acceptance is attached hereto as Exhibit "A" and is by reference incorporated herein as fully as if here copied in words and figures. That by said contract it was agreed between defendants and plaintiff that defendants, their heirs, executors and assigns would sell and convey to the Government, for a consideration of $21,425.00, the above mentioned real estate; that plaintiff was to have the right to the immediate occupancy and use of the land for any purpose whatsoever, and defendants agreed to execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, and to furnish, without cost to the Government, a certificate of title of the Kansas City Title Insurance Company to said land satisfactory to the Attorney-General of the United States, and, upon approval of said title, defendants agreed to have a deed to said land recorded and to have said Title Company furnish its certificate showing title to be good and marketable as vested in the United States of America, free of all encumbrances. Upon the furnishing of the final certificate of title, plaintiff bound itself to pay the aforesaid purchase price to defendants.

[fol. 29] That defendants did fully carry out and perform all of the obligations placed upon them by said contract and did, by good and valid general warranty deed dated February 6, 1941, and executed by Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr. and Virginia Albrecht, convey said lands to plaintiff, which deed was delivered to

the Kansas City Title Company, authorized to act for the plaintiff in that connection, and which Company had made all the necessary examinations of title without cost to plaintiff and supplied all of the required certificates of title, including a final certificate showing title in the United States Government, and that said contract has been fully executed and performed in each and every particular save and except that although plaintiff duly executed its check payable to these defendants and delivered the same to said Title Company for transmission to defendants, before the same was delivered plaintiff ordered the check withheld and later took possession thereof and, so far as defendants are informed, still retains the same. Defendants have not been paid the agreed purchase price, or any part thereof.

Defendants further state that they have, in reliance upon said contract, carried out the same as aforesaid and that plaintiff, prior to the institution of this action, went into possession of the aforedescribed land and ever since has been, and is now, holding possession and making use of said property, and that plaintiff is estopped from abrogating or disclaiming its obligation under said contract.

That the above mentioned contract between plaintiff and these defendants further provides that if, for any reason, the title to the land is not approved by the Attorney-General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with the terms and provisions of this option, and will, upon filing its petition in such proceedings, [fol. 30] deposit said agreed purchase price with the Clerk of said Court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings. Defendants have conveyed good and marketable fee simple title to all of said lands to the United States of America but defendants state that they have no information as to the final action of the Attorney-General of the United States on this subject, except that the filing of this action in condemnation and the allegation that these defendants own or may claim to own title to said property and that said land is subject to liens or claims for certain taxes and that other

persons, named and unknown, are made parties herein so that all of the rights, title, interest and estate may be divested out of such persons and vested in the United States of America, tend to indicate that the Attorney-General of the United States has not finally approved the title and that this action has been instituted by the United States of America pursuant to the aforesaid provision of the contract.

Defendants assert that if the Attorney-General has finally approved said title, then and in that event, plaintiff being at the time of the institution of this action the owner of the full and complete fee simple title to the property in question and being at said time in possession thereof, there would be nothing to condemn by this action, this would be a moot cause, and this Court would have no jurisdiction to proceed herein.

That defendants, in reliance upon the aforesaid contract, have conveyed their property to plaintiff and have surrendered possession thereof to plaintiff and that plaintiff has, for a long time past, been in full possession of said property and has been, and is now, using the same for its own purposes and benefit, and plaintiff is estopped to proceed in this action contrary to its duties and obligations under said contract and is bound to carry on this proceeding [fol. 31] in conformity with the provisions thereof, which are expressly applicable hereto.

Wherefore, it is prayed that the Court enter its verdict, judgment and decree, fixing the award for the land described in plaintiff's petition at $21,425.00 and requiring the plaintiff to deposit said agreed purchase price with the Clerk of this Court, the same to be disbursed by said officer pursuant to the decree entered in these proceedings.

IGOE, CARROLL, KEEFE
& McAFEE
J. W. McAFEE
Attorneys for Defendants,
1530 Boatmen's Bank Building,
St. Louis, Missouri.

[fol. 32] Separate Answer Of Albert W. Albrecht, Jr. And Virginia Albrecht.

(Filed Sept. 4, 1941.)

Come now Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, two of the defendants in the above entitled cause, and for their answer to plaintiff's petition filed herein state:

First: These defendants deny that they are the owners of the property in fee simple described in the plaintiff's petition as Tract No. 245, and further deny that they have any interest in said property at this time and have not had any interest therein since December 17, 1940.

Second: These defendants further deny each and every allegation in said petition contained.

Third: These defendants further state that on or about the 9th day of December, 1940, one R. Newton McDowell, a duly authorized agent of the plaintiff, acting within the scope of his authority came to these defendants and on behalf of the plaintiff solicited these defendants for an option to purchase the property described in plaintiff's petition, which said option was given by these defendants. The option of purchase was accepted by C. J. Harrold, Major, Quarter Master Corps, United States Army, acting within the scope of his authority for the benefit of the plaintiff on December 17, 1940. A copy of said option contract is hereto attached, marked Exhibit A, and made a part of this answer.

[fol. 33] Fourth: These defendants further state that pursuant to said contract they were to execute and deliver a warranty deed conveying fee simple title to the plaintiff and to furnish without cost to the plaintiff a certificate of the Kansas City Title Insurance Company, satisfactory to the Attorney General, showing title to be vested in the plaintiff; that said deed was delivered to the Kansas City Title as a duly authorized agent of the plaintiff and as directed by the plaintiff as set forth in the agreement, and that these defendants have caused to be prepared by the Kansas City Title Insurance Company and are willing to furnish to the plaintiff said certificate of title without any cost to the plaintiff showing title to be in the plaintiff.

Fifth: That a check was delivered by the plaintiff to the Kansas City Title Insurance Company to be delivered to defendants in the sum of $21,425.00, but before the check was delivered to the defendants, plaintiff gave the Kansas City Title Insurance Company instructions not to deliver said check and defendants have not received payment of said amount as provided for in option contract.

Sixth: These defendants further state that pursuant to said option contract they surrendered possession of said property to the plaintiff and to the best of their knowledge plaintiff did occupy the premises and has continued to occupy said property until the present time. That by the conveyance and the surrender of the property on the part of the defendants and by the plaintiff's using the property as though it had title to said property, plaintiff is estopped to proceed in this action contrary to its duties and obligations under said option contract.

Seventh: These defendants further state that said title was to be approved by the Attorney General and these defendants have no information as to whether the Attorney General did approve the title, but the action of the Attorney General in bringing this condemnation suit and alleging the interest of the defendants and other parties indicates that the title was not approved, and that this suit has been filed pursuant to a provision in the option contract that if for [fol. 34] any reason the Attorney General did not approve the title the Government will proceed to acquire the land by a condemnation proceeding under a consent verdict fixing the award at the agreed valuation and in accordance with the terms and provisions of the option contract and that the Government will upon filing its petition deposit the agreed price with the clerk to be disbursed pursuant to the decree in such proceeding.

Eighth: Defendants further state that if the Attorney General has approved the title, the title to the property involved is in the plaintiff, and there is nothing for the plaintiff to condemn in this action, and the case would be a moot case and the Court is without jurisdiction in the premises.

Wherefore, having fully answered, these defendants pray that the Court enter its verdict, judgment, and decree fixing the award at $21,425.00, and require the plaintiff to deposit

said amount with the clerk to be disbursed by him in accordance with the decree entered.

GEORGE EIGEL, 208 N. Broadway,
Attorney for Defendants, Albert W. Albrecht, Jr., and Virginia Al- Albrecht.

[fol. 35] Defendants' Exhibit A.

Option to Purchase Land.

Know All Men By These Presents: That the undersigned, Edgar S. Albrecht and Geraldine Albrecht, his wife, and Albert W. Albrecht, Jr. and Virginia Albrecht, his wife for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell and convey to the Government for the consideration of Twenty-one thousand Four Hundred Twenty-five Dollars ($21,425.00) that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

A tract of land located within Sections 34 and 35, Township 46 North, Range 3 East, described as follows: Beginning at an old stone at the Southwest corner of the Southeast quarter of Section 34, from which a hickory tree 11 inches in diameter bears S. 11° 05′ E., 0.356 chains; thence North 12.254 chains to an iron pipe from which a White Oak 10 inches in diameter bears S. 34° 15′ East, 0.302 chains and another White Oak 8 inches in diameter bears North 85° W., 0.434 chains; thence East 32.544 chains to a point in the center of a county road; thence along said County road North 1° 45′ East, 1.28 chains to an iron pipe; thence North 75° 55′ East, 11.03 chains to the western right of way line of Missouri U. S. Highway 40 TR; thence along said right of way line as follows: S. 17° 28′ East, 398.6 feet, S. 72° 32′ W., 50 feet, S. 17° 28′ East, 501.3 feet to a stake on the Northern line of the right of way of the Missouri, Kansas and Texas Railway Company; thence along the Northern line of said railroad right

of way S. 74° 58′ West; 10.96 chains to an iron pipe in the center of a county road; thence S. 74° 46′ West, 0.91 chains to an iron pipe driven on the Section line; thence along the Section line betwe n Sections 3 and 34 West 35.39 chains to the place of beginning and containing 55.816 acres exclusive of that part lying within the county road.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

[fol. 36] The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the under-

signed agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all [fol. 37] the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at St. Louis, Missouri, this 9th day of December, 1940.

M. Wilson
M. Wilson

EDGAR S. ALBRECHT,
GERALDINE ALBRECHT,
ALBERT W. ALBRECT, JR.
VIRGINIA ALBRECHT.

Witness:
R. J. Schultz
A. W. Albrecht.

Accepted by and on behalf of the United States of America this 17th day of December, 1940.

C. J. HARROLD,
Major QMC
United States Army

[fol. 38] Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option.

(Filed March 30, 1945)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed in this cause and for defendants fixing defendants' compensation for the taking of said real estate in the amount named in the option, without interest, and as reasons for said motion states:

(1) That this suit was filed by plaintiff to acquire, by condemnation, the real estate described in the petition filed in this cause, that a Declaration of Taking was filed and the sum of $2,232.00 was deposited in the Registry of the Court as the estimated just compensation for said real estate;

(2) That prior to the filing of the petition in this cause the defendants and the plaintiff, through the War Department, had executed an option contract for the purchase by the United States of America from the defendants the said real estate for the sum of $21,425.00, being the amount of compensation fixed in said option contract;

(3) The United States Supreme Court in the case of Muschany vs. United States, 89 L. Ed. Adv. Op. 492 (1945) has held an option contract to be valid and bind-
[fol. 39] ing, which option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation;

(4) That the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands described in plaintiff's petition for the purposes therein defined and against the defendants named in this cause, and against each and all of them, jointly and severally, as their rights may appear, and that the defendants, and each and all of them, jointly and severally are entitled to compensation in solido in the sum of $21,425.00, without

interest, being the full amount of the compensation mentioned in said option contract;

(5) That R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, under the terms and conditions of the said option contract, have, or may have, some right, title or interest in and to the said sum of $21,425.00 mentioned in said option contract.

Wherefore, plaintiff moves the Court to enter judgment in this cause for the condemnation of the said real estate, fixing the compensation to be paid by plaintiff to the defendant in the sum of $21,425.00, and directing plaintiff to pay into the Registry of the Court the deficiency of $19,193.00 and to make an order citing all persons and corporations, including the said R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, claiming an interest in the said fund to appear in this Court and to set up and file their claims therefor.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 30th day of March, 1945.

[fol. 40] Order Setting Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option for Hearing.

(Filed April 2, 1945.)

On oral motion of the plaintiff, by its attorneys, it is Ordered by the Court that the Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option filed by plaintiff in this cause be and the same is hereby set for hearing on the 7th day of May, 1945;

And it is further Ordered that the plaintiff give notice of the date fixed for the hearing of said motion to all defendants in this cause and to their attorneys of record by mailing to each of said defendants, whose places of

residence are known, and their attorneys and to R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option and a copy of this order, and by posting in the office of the Clerk of this Court in the City of St. Louis, Missouri a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option, together with a copy of this order, at least ten days before the time fixed in this order for the hearing of said motion.

R. M. DUNCAN,
United States District Judge.

Dated this 2nd day of April, 1945.

[fol. 41] Answer Of Defendants Edgar S. Albrecht, Geraldine Albrecht, His Wife, Albert W. Albrecht, Jr., And Virginia Albrecht, His Wife, To Plaintiff's Motion For Judgment In Condemnation And Fixing Compensation By Option And Without Interest, And Motion By Said Defendants For Judgment.

(Filed May 2, 1945.)

Come now the defendants Edgar S. Albrecht, Geraldine Albrecht, his wife, Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, in response to the motion heretofore filed in this cause praying the Court to give judgment for plaintiff in condemnation and to fix defendants' compensation in the amount of the option contract therein referred to but without interest on said amount, and for answer to said motion, these defendants say:

(1) Defendants admit that, as alleged in paragraph (1) of said motion, the suit was filed, and that the declaration of taking was filed, and that the sum of $2,232.00 was deposited in the registry of this Court as the estimated just compensation for the value of the real estate described in the petition filed in this cause; and, in this connection, defendants allege that all of said things were done on the 9th day of April, 1941.

(2) These defendants admit that the contract referred to as the option contract was duly made and entered into as alleged in paragraph (2) of said motion.

(3) These defendants admit the statements contained in paragraph (3) of said motion.

(4) These defendants admit that the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands of these defendants described in the petition for condemnation long since filed herein, and they admit that the sum of $21,425.00 is the amount that was agreed upon in said option contract as the value of said property as of the date of taking thereof, as alleged in paragraph (4) of said motion; but they deny that the plaintiff has any right to avoid payment of interest on said amount, and these defendants allege that they are entitled to a judgment in their favor for the sum of $21,425.00, with interest at six per cent per annum on said amount from the date of the taking of the lands described in said petition, which was on or about December 17, 1940, to the making of the deposit herein referred to on the 9th day of April, 1941, and interest at six per cent per annum on the sum of $19,193.00 (being the difference between said sum of $21,425.00 and the amount paid into this Court at the time of the filing of the declaration of taking, to-wit, the sum of $2,232.00), from the said 9th day of April, 1941, until the same is paid, and these defendants pray that judgment be entered accordingly.

[fol. 42] (5) These defendants allege that no person other than these defendants owned any interest whatever in the lands above referred to prior to the filing of the aforesaid declaration of taking by plaintiff on or about the 9th day of April, 1941, nor is any person other than these defendants entitled to any part whatsoever of the proceeds of the judgment to be entered in this case fixing the amount of compensation to be awarded for said lands; and that, therefore, these defendants pray the Court to find by its order and judgment that these defendants alone are entitled to the

amount of such judgment and such interest as the same may bear until the same is paid, as above set out.

GEO. EIGEL,
722 Chestnut Street,
St. Louis, Missouri,
Attorney for Defendants Albert W. Albrecht, Jr., and Virginia Albrecht, His Wife.

IGOE, CARROLL, KEEFE & COBURN,

ROBERTS P. ELAM,
1530 Boatmen's Bank Building,
St. Louis, Missouri,
Attorneys for Defendants Edgar S. Albrecht and Geraldine Albrecht, His Wife.

Receipt of a copy of the above and foregoing answer and motion is hereby acknowledged this.....day of May, 1945.

.....
United States Attorney

[fol. 43] (List of Checks deposited in Registry of District Court to cover certain Lands in Weldon Spring Ordnance Project.)
(Filed May 17, 1945.)

In The United States District Court
Eastern District Of Missouri
Eastern Division

Weldon Spring Ordnance Project

Cases No. 767	—	Deficiency	—	$26,900.04	818 —	Def. —	$114.00
765	—	"	—	7,028.20	817 —	" —	8,140.00
766	—	"	—	22,365.00	820 —	" —	19,193.00
763	—	"	—	3,125.00	822 —	" —	6,760.00
764	—	"	—	22,791.00	824 —	" —	4,770.00
771	—	"	—	6,170.00	823 —	" —	13,992.00
772	—	"	—	660.00	854 —	" —	6,100.00
777	—	"	—	5,855.00	877 —	" —	3,725.00
778	—	"	—	2,935.20	865 —	" —	567.00
779	—	"	—	3,967.83	866 —	" —	7,510.00
780	—	"	—	2,000.00	863 —	" —	932.50

781	"	875.00	873	"	7,457.20
782	"	5,792.00	872	"	6,900.00
783	"	5,700.00	858	"	3,443.00
784	"	4,368.00	860	"	8,040.00
785	"	34,250.00	859	"	16,480.00
786	"	2,630.18	862	"	2,200.00
796	"	19,694.00	879	"	1,440.00
805	"	21,511.25	875	"	5,729.00
812	"	6,080.00	876	"	7,695.00
810	"	110.00	856	"	4,300.00
813	"	4,428.75	868	"	1,380.00
814	"	7,283.00	869	"	3,697.00
797	"	3,825.00	960	"	48,500.00
806	"	2,940.00	978	"	14,132.00
808	"	11,140.00	985	"	1,240.00
811	"	5,435.00	988	"	21,374.25
834	"	4,878.00	984	"	1,500.00
841	"	8,670.00	999	"	2,140.00
833	"	2,150.00	1000	"	500.00
840	"	3,580.00	1001	"	2,500.00
832	"	760.00	1002	"	11,115.25
827	"	7,940.00	1003	"	29,297.00
843	"	4,620.00	979	"	7,120.00
830	"	1,200.00	981	"	25,000.00
829	"	312.00	980	"	16,312.50
839	"	4,860.00	989	"	3,100.00
838	"	2,440.00	986	"	2,600.00
844	"	1,493.36	987	"	18,000.00
835	"	6,960.00	992	"	933.00
826	"	3,760.00	993	"	3,617.00
852	"	17,460.00	994	"	1,100.00
853	"	850.00	995	"	16,000.00
774	"	1,563.00	997	"	20,400.00
798	"	8,260.00	991	"	1,750.00
803	"	4,100.00	1006	"	3,600.00
789	"	10,820.00	1010	"	32,804.45
792	"	9,775.74	1015	"	23,129.45
800	"	36,720.00	1014	"	450.00
790	"	8,440.00	1021	"	7,140.00
791	"	9,042.00	1019	"	12,174.00
793	"	5,100.00	1020	"	6,170.20
794	"	17,985.00	1648	"	1,670.00
804	"	14,780.00	1652	"	2,723.00
819	"	3,050.00			

$920,085.35

[fol. 44] Check No. 8,051,506 $87,595.70
8,051,507 48,500.00
8,051,508 4,393.00
8,051,509 115,932.50
8,051,510 182,604.74

——————8,051,511	————— 85,468.10
——————8,051,512	————— 229,583.57
——————8,051,513	————— 7,028.20
——————8,051,514	————— 83,798.54
——————8,051,515	————— 22,365.00
——————8,051,516	————— 26,900.00
——————8,051,517	————— 22,791.00
——————8,051,518	————— 3,125.00
	$920,085.35

of the Treasurer of the United States, in the sum of $920,085.35, to the order of the Clerk of the United States District Court for the Eastern District of Missouri, Eastern Division, deposited by the plaintiff for the lands described in the petitions, the aforesaid sum of $920,085.35 being deposited by the plaintiff in the Registry of the Court herein as to the aforesaid lands, for the use and benefit of the person or persons entitled thereto, the same to be applied under orders of this Court.

HARRY C. BLANTON,
United States District Attorney.

Received the above mentioned checks and deposited same in the Registry of this Court, this 17th day of May, 1945.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.

[fol. 45] Opinion.

(Filed June 22, 1945.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,

vs.

Certain Land In St. Charles County, Missouri, Known As The Weldon Spring Area, Defendants.

No. 782: No. 840: No. 980:
No. 784: No. 844: No. 984:
No. 804: No. 852: No. 988:
No. 820: No. 854: No. 994:

No. 822: No. 862: No. 1002:
No. 824: No. 868: No. 1020:
No. 832: No. 872: No. 1648:
No. 834: No. 878: No. 1652
No. 838: No. 978: .....

The above cases, together with the cases pending in each of the other divisons of this court, for the purpose of avoiding repetition of the argument before each judge, were argued before the judges of the three divisions sitting en banc.

I have carefully studied the records and the briefs submitted, as well as the Memorandum Opinions written by my colleagues Judge Moore and Judge Hulen. In view of the fact that the other judges have written conflicting opinions respecting their views and have arrived at different conclusions, I see no necessity for filing an extended opinion on my part.

I am of the opinion that the defendants are entitled to interest on the difference between the amount deposited in the registry of the court at the date of the filing of the Declaration of Taking and the amount specified in the option agreement until such difference is deposited in the registry of the court for the benefit of the defendants.

I am also of the opinion that the owners are not entitled to interest from the date of the taking of possession by the Government under the option agreements, until the filing of the Declarations of Taking.

I therefore concur in the conclusions reached by my colleague Judge Moore in his Memorandum Opinion filed on June 8, 1945.

Judgments may be submitted for approval, allowance and entry.

R. M. DUNCAN,
United States District Judge.

Dated this 22nd day of June, 1945.

[fol. 46] Findings and Judgment.

(Filed June 29, 1945.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 820. vs. At Law.
59.11 Acres Of Land, More Or Less, Situate In The County Of St. Charles, State Of Missouri, Known As Tract No. 245, And Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., Virginia Albrecht, Collector Of Revenue Of St. Charles County, Missouri, And County Of St. Charles, State Of Missouri, Defendants.

Now on this day, the Court having heretofore heard a motion filed by the plaintiff for judgment for plaintiff in condemnation and fixing the amount to be paid the defendants at the price agreed to by option contract referred to and set up in the answer filed by the defendants herein, without interest, and an answer and countermotion thereto by the defendants Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht for judgment, including interest, and evidence having been heard, and arguments of counsel having been made, and said motions taken under advisement, and the Court being now fully informed in the premises, doth find:

That this is a proceeding in condemnation, instituted by the United States of America, as plaintiff, against Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., Virginia Albrecht, Collector of Revenue of St. Charles County, Missouri, and County of St. Charles, State of Missouri, as defendants, to condemn the land hereinafter described, as in [fol. 47] such cases made and provided by the laws of the United States of America, and in which there was filed a Declaration of Taking as provided for by Title 40 United States Code, Section 258a.

That all of the defendants have been duly [servied] with process as required by law, or have duly entered their appearances herein; and that this Court has jurisdiction of the subject matter of this cause, and of all of the parties thereto.

That prior to the filing of the petition herein and prior to any proceedings in connection therewith, including the filing of a Declaration of Taking in this cause, the defendants Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht and the plaintiff, through the War Department of the United States, entered into and executed a contract, sometimes referred to as an "option contract," which was accepted by the plaintiff in accordance with the terms thereof, whereby and as a result of which the plaintiff agreed to purchase and the said last named defendants agreed to sell to the plaintiff, for the price and sum of $21,425.00, the real estate or land hereinafter described.

That the said defendants Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht were at the time of executing said option contract, and the filing of said Declaration of Taking, the owners in fee simple of the land hereinafter described.

That, upon the acceptance by the plaintiff of said option contract, on or about the 17th day of December, 1940, possession of the land hereinafter described was taken by, and has ever since been in, the plaintiff, United States of America.

That, since this proceeding was instituted and the Declaration of Taking filed herein, the Supreme Court of the United States has held binding on the parties thereto, in so far as concerns the worth or value of the land at the time of taking by the United States of America, an option contract for the sale of land, the provisions of which and the circum- [fol. 48] stances [surroundint] the execution of which are the same as the option contract executed by the plaintiff and the defendants Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht, except as to dates, the names of the land owners, the description of the property, and the sale price. That, under the aforesaid decision of the Supreme Court of the United States and the terms and provisions of the option contract executed by the plaintiff and the defendants Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht the sum of $21,425.00 was and is the purchase price agreed upon in said option contract as the value or worth of the

land hereinafter described at the time of the taking thereof by plaintiff, and said defendant land owners were entitled to said sum of $21,425.00 for the taking of said land hereinafter described, as of the date of the taking of said land.

That on the 9th day of April, 1941, prior to the aforesaid decision of the Supreme Court of the United States, the plaintiff herein caused to be filed in this cause a Declaration of Taking of the land hereinafter described, by Henry L. Stimson, Secretary of War of the United States, and, upon the filing of said Declaration of Taking, the fee simple title to the land therein described, and hereinafter described, became vested in the United States of America, the plaintiff herein, and the title to and possession of said land was then and has ever since been in the plaintiff, United States of America, and none of the defendants has since had any right, title or interest in said land.

That at the time of the filing of said Declaration of Taking by Henry L. Stimson, Secretary of War of the United States, there was deposited by the plaintiff in the registry of this Court the sum of $2,232.00 as the then estimated compensation stated in said Declaration of Taking for the [fol. 49] appropriation and taking by plaintiff of the fee simple title to the land in said declaration described, and hereinafter described; but that said deposit was erroneous and insufficient in that the same failed to equal the agreed value or worth of said land hereinafter described at the date of the taking and appropriation thereof by plaintiff.

That on the 17th day of May, 1945, there was deposited in the registry of this Court by plaintiff an additional sum of $19,193.00 as additional compensation for the taking and appropriation by plaintiff of the fee simple title to the land in said Declaration of Taking described, and hereinafter described.

That the said deposits heretofore made by plaintiff into the registry of this Court were erroneous and insufficient, in that the same failed to include interest on the $19,193.00 withheld from the registry of this Court during the period from the filing of the Declaration of Taking herein on the 9th day of April, 1941, until the 17th day of May, 1945, which interest defendant land owners were and are entitled to re-

ceive as a part of the just compensation for the taking and appropriation by plaintiff of the land hereinafter described.

That the plaintiff's petition and the proceedings in this cause set forth a cause of action for the purpose of acquiring, by proceedings in condemnation, the fee simple title to the land hereinafter described, which land was and is necessary to provide for the establishment of an ordnance plant for the national [defendse] of the United States of America and for other military use incidental thereto in connection with the Weldon Spring Ordnance Plant; and that the awarding to the plaintiff of a judgment in condemnation, and the awarding to the defendant land owners of full just compensation for said land, in this condemnation proceeding, will perfect in the plaintiff, and divest from defendants, finally and completely, the title to the land hereinafter described, in conformity with the law of the United [fol. 50] States of America.

That the land described in plaintiff's petition, known as Tract No. 245, is the land described in the Declaration of Taking referred to herein, and is bounded, defined and described as follows:

"59.11 acres of land, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

"A tract of land located within Sections 34 and 35, Township 46 North, Range 3 East, described as follows: Beginning at an old stone at the southwest corner of the SE¼ of Section 34; thence North 12.254 chains to an iron pipe; thence East 32.544 chains to a point in the center of a County Road; thence along said County Road North 1 degree 45 minutes East 1.28 chains to an iron pipe; thence North 75 degrees 55 minutes East 12.47 chains to the center right of way line of Missouri U. S. Highway 40 Tr; thence along center line of said right of way, South 17 degrees 28 minutes East 975 feet, more or less, to center line of right of way of the M. K. & T. Railroad Company; thence along the center line of said railroad right of way South 74 degrees 58 minutes West 13.12 chains more or less, to an iron pipe in the center of a county road; thence along the section line between Sections 3 and 34 West 35.39 chains to the place of beginning, situated in St. Charles County, Missouri, and

containing 59.11 acres more or less, subject to all existing highway and public utility easements, but including the fee underlying such existing easements, subject also to right of way easement of M.K.&T. Railroad Company."

That the plaintiff's said motion for judgment should be sustained in part, but should be denied in so far as the same seeks to prevent defendant land owners from receiving any interest as a part of the full compensation to be allowed them for said land.

That the defendant land owners' said motion for judgment should be sustained in part, and denied only in so far as the same prays interest on the said sum of $21,425.00 from the date of the taking of physical possession of said land on or about December 17, 1940, to the filing of the Declaartion of Taking herein on the 9th day of April, 1941, and interest on the sum of $19,193.00 subsequent to May 17, 1945.

Now, therefore, in accordance with the above findings [fol. 51] of fact, it is Ordered, Adjudged And Decreed that:

(1) Plaintiff, United States of America, by virtue of this proceeding, is awarded judgment in condemnation against the premises described in plaintiff's petition and hereinabove described, for the purposes herein defined and specified, and against the defendants herein, and each and all of them, jointly and severally, as their title and rights may appear, and that the title in fee simple, subject to all [exising] highway and public utility easements but including the fee underlying such existing easements, is vested in the plaintiff, United States of America, and has been vested in the plaintiff, United States of America, upon and since the filing of the Declaration of Taking, and the defendants, and each and all of them, jointly and severally, are divested of any and all right, title, interest and claim, of every nature and description, in the land above described.

(2) That in accordance with the option contract executed by the plaintiff, United States of America, and the defendant land owners, and accepted by the United States of America, the defendant land owners are entitled to and there is awarded to them the sum of $2,425.00 as and for the

agreed value or worth of said land, as of the date of the filing of the Declaration of Taking herein, together with interest on $19,193.00 of said sum at the rate of six per cent per annum from the 9th day of April, 1941, until the 17th day of May, 1945, which said sum of $21,425.00 and said interest constitute the full just compensation to which defendant land owners, and any and all other persons who may be found entitled thereto as claiming by, through or under them, are entitled in this cause for said land.

(2) That the plaintiff shall pay into the registry of this Court forthwith the sum of $4,727.87, being the equivalent [fol. 52] of six per cent interest on said sum of $19,193.00 from the 9th day of April, 1941, to the 17th day of May, 1945, as that part of the just compensation to which defendants are entitled for the taking by plaintiff of said land herein described which has not been heretofore deposited in the registry of this Court by plaintiff, which amount, together with the amounts heretofore deposited in the registry of this Court, shall repose in the registry of this Court for the use and benefit of the defendant land owners, and other defendants claiming an interest therein by and through the defendant land owners, and for disposition in the way, manner and proportion as this Court shall hereafter order, adjudge and decree.

(4) That this cause shall be held open for entry of such further and other orders and decrees as may be meet and just in the premises.

Dated this 29 day of June, 1945.

R. M. DUNCAN,
United States District Judge.

[fol. 53] (Motion of Plaintiff for New Trial.)

(Filed July 7, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial for the following reasons;

1. The Court erred in holding that this is an adversary condemnation proceeding;

2. The Court erred in not holding that this is a friendly condemnation proceeding according to the terms and provisions of the option-contract;

3. The Court erred in not holding that the filing of the equitable answer by the property owners converted this condemnation proceeding into an equitable action for the enforcement of the option-contract;

4. The Court erred in holding that this condemnation proceeding differs in no respect from any other condemnation proceeding except in the method of ascertaining the value of the land;

5. The Court erred in not holding that the equitable answer filed by the property owners in this case and the decision of the Supreme Court of the United States upholding the validity of the option-contract and the allegations of the equitable answer took the case out of the operation of the Declaration of Taking part of this condemnation proceeding;

[fol. 54] 6. The Court erred in holding that there was an ascertainment of the value of the land in this proceeding, for it has never been ascertained by this Court nor by any Appellate Court;

7. The Court erred in not holding that the compensation was not ascertained in this proceeding but that on the contrary it was fixed by the option-contract and the opinion of the Supreme Court of the United States holding such option-contract to be valid and binding upon the plaintiff;

8. The Court erred in its construction of the option-contract;

9. The Court erred in holding that the amount mentioned in the option-contract was the fair market value of the land involved in this case at the time of the filing of the Declaration of Taking in this case;

10. The Court erred in not holding that the sum mentioned in the option-contract is the full compensation to which the property owners are entitled in this proceeding;

11. The Court erred in its definition as to what constitutes just compensation;

12. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty to be paid by the plaintiff for its failure to perform the conditions of the option-contract immediately after its acceptance by the Government;

13. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty against the Government for litigating the validity of the option-contract;

14. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty for the Government's delay in the payment of the amount mentioned in the option-contract when such delay was caused by the vigilance and diligence of plaintiff's Officers and Attorneys in litigating the validity of the option-contract, and with the acquiescence of the defendant property owners;

[fol. 55] 15. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty without citing some statute authorizing such penalty;

16. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to promptly perform and fulfill the provisions and conditions of the option-contract;

17. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to fully and completely perform and fulfill the provisions and conditions of the option-contract;

18. The Court erred in its construction of the opinion of the Supreme Court of the United States in the Andrews and Muschany cases;

19. The Court erred in not holding that the Supreme Court of the United States held that the amount mentioned in the option-contract was full and complete compensation when the Supreme Court said:

"The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this

offer, agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses . . . The Government knew the total cost when it became bound on the contract." (emphasis added)

20. The Court erred in holding that the burden of proof is upon the Government to show the absence of any contract obligation to pay interest or any statute providing for interest;

21. The Court erred in not holding that the burden of proof is upon the property owners to point out the exact provision of the contract providing for interest or to point out the exact provision of the statute providing for interest and a full compliance by the property owners with such statute;

[fol. 56] 22. The Court erred in allowing interest upon any part of the amount mentioned in the option-contract and for any period of time;

23. The decision of the judgment now entered is contrary to the views of the Court when the question of the option was first presented to the Court in the Muschany and Andrews cases when the District Courts held in the Findings of Fact and Conclusions of Law that the property owners were entitled to recover only the principal amount named in the option without interest;

24. That as the Supreme Court, the Court of Appeals and the District Court all held in passing on the McDowell option that the amount included therein included not only the value of the land but compensation to the title company, compensation to McDowell by way of commission, and other expenses, to now allow interest on the entire sum to the property owner would be to allow him interest on not only the value of his land but also on other items which do not belong to him, but which, in truth and in fact, are being paid by the Government and not by the property owners to the title company and to McDowell;

25. That by including all of these elements in the amount named in the option, as well as the value of the land, the parties conclusively show that they were consid-

ering the amount of the option to be the total and entire amount to be paid by the Government as full compensation for the land and the other elements named therein, and further show that it was the intention of the parties that that amount and no additions thereto by way of interest was to be paid by the Government;

26. That the Court erred in holding that the amount named in the option represented the value of the land in view of the holding of the Supreme Court that it did not represent that amount at all, but that it represented the agreed purchase price, and in view of the fact that the option contract itself repeatedly refers to it as the agreed [fol. 57] purchase price and not value;

27. That the position of the land owners in asking for interest under the Declaration of Taking Statute is inconsistent with their prior position heretofore asserted that they were entitled to have the option contract enforced as an option contract and that said contract not calling for interest, having failed to provide for the payment of interest, does not now entitle the landowners to interest in addition to the principal amount named therein;

28. The Court erred in finding that, upon the acceptance by the plaintiff of the said option-contract the possession of the land involved herein was taken by, and has ever since been in the plaintiff, the United States of America, because there was no evidence to sustain the said finding of fact;

29. The Court erred in not holding that the right to immediate possession of the land was included in the consideration mentioned in the option-contract and that such right of immediate possession was contracted for in the said option-contract and that the payment of the consideration mentioned in the option-contract is full payment for the land herein involved and for the right to immediate possession thereof obtained by the plaintiff under such option-contract;

30. The Court erred in holding that there was a taking under the Declaration of Taking filed in this cause such as contemplated by the Declaration of Taking Stat-

ute because the right to possession of the property had theretofore been contracted for under the terms and provisions of the option-contract;

31. The Court erred in holding that the property owners are entitled to interest under the provisions of the Declaration of Taking Statute because there was no taking under the Declaration of Taking which could authorize the allowance of interest under such statute;

[fol. 58] 32. The Court erred in holding that there was an ascertainment of just compensation in this proceeding such as is mentioned and contemplated in the Declaration of Taking Statute, in order to warrant the inclusion, as part of the just compensation awarded, of interest at the rate of 6% per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment, or upon such part of the amount finally awarded as was not deposited contemporaneously with the Declaration of Taking;

33. The Court erred in holding that the two deposits made in this case, the first with the Declaration of Taking and the second on May 17, 1945 were erroneous and insufficient in that they failed to include any interest;

34. The Court erred in its judgment and decree entered in this cause by adding interest at the rate of 6% per annum upon the deficiency or upon the difference between the amount deposited with the Declaration of Taking and the amount mentioned in the option-contract;

35. The Court erred in its judgment and decree entered in this cause by including interest at the rate of 6% per annum from the date of the Declaration of Taking in this cause to May 17, 1945 upon the amount deposited in the Registry of this Court on the said 17th day of May, 1945;

36. The Court erred in its judgment and decree entered in this cause by requiring the plaintiff to pay into the Registry of the Court forthwith a sum of money equivalent to 6% interest on the sum deposited in the Registry of this Court on May 17, 1945 from the date of the Declaration of Taking in this case to the date of said deposit on May 17, 1945 as a part of the just compensation to

which the defendants are entitled for the taking of the lands involved in this cause;

[fol. 59] 37. The Court erred in its findings and in its judgment and decree in the computation of the amount of the interest adjudged to the defendants upon the deficiency from the date of the Declaration of Taking to May 17, 1945;

38. The Findings and Judgment entered in this cause are contrary to and against the evidence under the law, are contrary to and against the law under the evidence and are contrary to and against the law and the evidence;

Wherefore, Plaintiff moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial herein.

HARRY C. BLANTON,
United States Attorney,

RUSSELL VANDIVORT,
Assistant United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 7th day of July, 1945.

[fol. 60] (Order overruling Motion of Plaintiff for New Trial.)

November 26, 1945.

Motion of plaintiff for a new trial submitted by plaintiff, taken as submitted by defendants, and overruled.

[fol. 61] Statement of Points to be Relied Upon on Appeal.

(Filed December 7, 1945.)

In the United States District Court for the Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 820. vs. At Law.
59.11 Acres of land, more or less, situate in the County of St. Charles, State of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., Defendants.

The United States of America, appellant in the above-entitled case, states that the following points will be relied upon on the appeal:

1. The district Court erred in denying the Plaintiff's motion for judgment fixing compensation in the amount of the option contract price, without interest.

2. The district Court erred in entering judgment with interest on $19,193.00, the difference between $21,425.00, the amount of the option contract price, and $2,232.00, the sum deposited with the Declaration of Taking, from the 9th day of April, 1941, the date of the filing of the Declaration of Taking, to the 17th day of May, 1945, the date of the deposit in court of such difference.

3. The district Court erred in overruling plaintiff's motion for a new trial.

Respectfully submitted,

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

Copy mailed to Opposing Counsel this 7th day of December, 1945.

HARRY C. BLANTON,
United States Attorney.

[fol. 62] Designation of the Record on Appeal.

(Filed December 7, 1945.)

United States of America, Appellant in the above entitled cause, designates for inclusion in the Transcript of the Record on Appeal the pleadings, Proceedings and evidence as follows:

	Filed
(1) Petition in Condemnation as amended September 15, 1941	April 9, 1941
(2) Declaration of Taking, in Cause No. 770, omitting therefrom all names from the caption except the defendants Edgar S. Albrecht and Albert W. Albrecht, Jr., and omitting from the paragraph describing the parcels of land in said Declaration all except Tract No. 245	April 7, 1941
(3) Order and Judgment vesting Title in the Plaintiff as to Tract No. 245 and Order of Immediate Possession	April 9, 1941
(4) Order directing transfer of $2,232.00 to this cause for the use and benefit of the defendants in this cause	April 9, 1941
(5) Answer of defendants Edgar S. Albrecht and Geraldine Albrecht to Plaintiff's petition	July 2, 1941
(6) Answer of Albert W. Albrecht, Jr., and Virginia Albrecht to Plaintiff's petition	Sept. 4, 1941
(7) Motion of Plaintiff for Judgment in condemnation and judgment for defendants fixing compensation by option-contract	March 30, 1945

[fol. 63] (8) Order setting for hearing on May 7, 1945, the Motion of Plaintiff for Judgment in Condemnation — April 2, 1945

(9) Answer of defendants Edgar S. Albrecht, et al., to Plaintiff's Motion for Judgment in condemnation and fixing compensation by option-contract without interest, and Motion of said defendants for judgment with interest — May 2, 1945

(10) Receipt of Clerk for $19,193.00 paid into the Registry of the Court — May 17, 1945

(11) Memorandum Opinion of the Court finding the issues in favor of the defendants and against the Plaintiff — June 22, 1945

(12) Findings and Judgment — June 29, 1945

(13) Plaintiff's Motion for a New Trial — July 7, 1945

(14) Docket entry of November 26, 1945 overruling Plaintiff's Motion for a New Trial

(15) Plaintiff's notice of appeal — Nov. 27, 1945

(16) Appellant's Statement of Points

(17) Clerk's Docket entries

(18) This Designation of the Record

(19) All other pleadings and documents filed in connection with this appeal.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

.....
Special Assistant United States Attorney.

Copy mailed to Opposing Counsel this 7th day of December, 1945.

HARRY C. BLANTON,
United States Attorney.

[fol. 64] Clerk's Certificate.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the above and foregoing to be a full, true and complete transcript (except in so far as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in case No. 820, wherein the United States of America is plaintiff-appellant and 59.11 Acres of land, more or less, situate in the County of St. Charles, State of Missouri, Known as Tract No. 245, and Edgar S. Albrecht, et al., are defendants-appellees, as fully as the same remains on file and of record in my office.

Seal of U. S. Dist. Court East. Div. of the East. Judicial Dis. of Mo.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said court at office in the City of St. Louis, Missouri, in said Division of said District this 12th day of December, in the year of our Lord, Nineteen Hundred and Forty-five.

JAMES J. O'CONNOR,
Clerk, U. S. District Court,
By John J. Jarvis,
Deputy Clerk.

Filed Dec. 12, 1945, E. E. Koch, Clerk.

[fol. 1] Notice of Appeal.)

(Filed November 28, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 800. vs. At Law.
356.51 Acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 174, and Q. W. S. S. Realty and Investment Company, a Corporation, et al., Defendants.

Notice is hereby given that the United States of America, Plaintiff in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this cause on the 26th day of November, 1945.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 28th November 1945.

[fol. 2] Docket entry showing filing notice of appeal and mailing copy of such notice to atty. of record for landowner defendant.

(November 28, 1945.)

Notice of appeal to the United States Circuit Court, 8th Circuit from final judgment entered herein November 26, 1945 filed and copy of said notice forthwith mailed by the Clerk of the Court to Samuel M. Watson, Esq., atty. of record for landowner defendant.

[fol. 3] (Clerk's Docket Entries of Case No. 800.)

United States Of America, Plaintiff,
Docket No. 800. vs. At Law.
356.51 Acres of land, more or less, situate in St. Charles County, State Of Missouri, Known as Tract No. 174, and Q. W. S. S. Realty And Investment Company, a Corporation, et al., Defendants.

4-9-41	Motion of plaintiff for leave to file petition in condemnation and for order for summons filed and presented and granted in order filed and entered; petition in condemnation filed and summons issued directed to defendants returnable May 19, 1941; on oral motion of plaintiff, order and judgment filed and entered on Declaration of Taking filed April 7, 1941, in Cause No. 770 vesting fee simple title in plaintiff as to tract designated herein and directing delivery of immediate possession to plaintiff; order filed and entered directing notice be given to defendants of judgment on Declaration of Taking and of requirement for immediate delivery of possession to plaintiff; on oral motion of U. S. Attorney, order filed and entered directing transfer of $15,280.00 to this Cause for the use and benefit of defendants entitled thereto from the sum heretofore deposited by plaintiff in Registry under Declaration of Taking filed in said Cause No. 770, being the estimated compensation for said Tract No. 174 herein.
5-19-41	Answer of defendant, Q.W.S.S. Realty & Investment Company to plaintiff's petition in condemnation, filed.
5-19-41	Marshal's Return of service to summons and order filed. (Executed)
5-19-41	On motion of U. S. Attorney, order filed and entered continuing cause to June 2, 1941.
5-29-41	Upon oral application, plaintiff granted 30 days from this date within which to plead to answer of defendant, Q.W.S.S. Realty & Investment Co., in order filed and entered.

6- 2-41 On motion of U. S. Attorney, order filed and entered continuing cause to June 16, 1941.

6-16-41 On motion of U. S. Attorney, order filed and entered continuing cause to June 30, 1941.

6-30-41 Order filed and entered continuing cause to Sept. 15, 1941.

7-24-41 On motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend its petition herein by joining H. H. Steed, Trustee, et al., as additional parties defendant and directing issuance of summons to such defendants returnable Sept. 15, 1941.

7-30-41 Return of Marshal of the Western Dist., of Missouri to summons filed. (Executed)

[fol. 4] 9-15-41 On motion of U. S. Attorney, order filed and entered continuing case to October 14, 1941. Division No. 3

9-16-41 Marshal's Return of service to summons, filed, (Executed)

10-14-41 On oral motion of U. S. Attorney, order filed and entered continuing case to Nov. 3, 1941.

11- 3-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to January 14, 1942.

1-14-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to April 30, 1942.

3- 4-42 On motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition by deletion and interlineation as to land description.

4- 8-42 Upon motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition by adding Willie Wackher, etc., as party defendant, and directing the issuance of summons to such defendant returnable May 10, 1942.

4-10-42 Upon oral motion of plaintiff, order filed and entered amending order to implead a defendant

filed herein April 8, 1942 by changing the return date of such order from May 10, 1942 to May 11, 1942.

4-30-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to May 11, 1942.

5- 6-42 Marshal's Return of service to summons, filed (Not executed).

5-11-42 Upon oral motion of U. S. Attorney, order filed and entered directing issuance of alias summons to defendant Willie Wackher, etc., returnable June 3, 1942. Upon oral motion of U. S. Attorney, order filed and entered continuing cause to June 3, 1942.

6- 3-42 Upon oral motion of U. S. Attorney, order filed and entered continuing cause to July 15, 1942.

6- 3-42 Marshal's Return of service to summons, filed. (Executed)

7-15-42 Order of Hon. Charles B. Davis continuing cause upon oral motion of U. S. Attorney to September 8, 1942, received, filed and entered.

9- 8-42 On oral motion of U. S. Attorney order filed and entered continuing cause to Dec. 8, 1942.

12- 7-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to Jan. 8, 1943.

12-12-42 On motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition by adding James S. Martin etc., et al. as parties defendant and directing issuance of summons to defendant James S. Martin returnable January 8, 1943.

[fol. 5] 1- 7-43 Marshal's Return of service to summons filed. (Not executed)

1- 8-43 Upon petition of plaintiff filed and presented, order of publication filed and entered. On oral motion of U. S. Attorney, order filed and entered continuing cause to February 19, 1943.

1-16-43 Affidavit under Soldiers' and Sailors' Act as to defendants Willie Wackher, et al. filed by plaintiff.

2-17-43 Affidavit as to publication of order of publication filed by plaintiff.

2-19-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to May 11, 1943.

5-11-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to Nov. 12, 1943.

6- 3-43 Upon stipulation between plaintiff and defendants Q. W. S. S. Realty & Investment Company, et al. filed and presented, order for provisional disbursement from Registry of estimated compensation filed and entered.

11-12-43 On oral motion of U. S. Attorney, order filed continuing cause to February 10, 1944.

2-10-44 On oral motion of U. S. Attorney, order filed continuing cause to May 11, 1944.

5-11-44 On oral motion of U. S. Attorney, order filed continuing cause to November 3, 1944.

11- 2-44 On oral motion of U. S. Attorney, order filed passing cause heretofore set for November 3, 1944 to February 3, 1945.

2- 3-45 On oral motion of U. S. Attorney, order filed continuing cause to June 4, 1945.

3-20-45 Motion of plaintiff for judgment in condemnation and for judgment for defendants fixing compensation by option filed and presented, and order thereupon filed and entered setting said motion for hearing on April 4, 1945; vacating order heretofore entered continuing cause to June 4, 1945; directing plaintiff give notice by mail of such hearing to defendants, their attorneys, R. Newton McDowell and The Kansas City Title Insurance Company, as well as post notice of such hearing, etc.

3-21-45 Affidavit as to mailing of notice to defendants and other parties in interest of hearing on mo-

tion of plaintiff for judgment in condemnation and for judgment for defendants fixing compensation by option filed by plaintiff.

3-26-45 Claim of plaintiff in its own behalf and for Collector of Internal Revenue for the 6th Collection District of Missouri, asserted against any disbursement herein from Registry awarded to R. Newton McDowell, by reason of certain liens, interest and penalties thereon, filed.

[fol. 6] 3-30-45 Claim of intervening defendant Kansas City Title Insurance Company filed.

4- 2-45 Clerk's Return to posted notice filed.

4- 2-45 Amended answer of defendant Q. W. S. S. Realty & Investment Company to plaintiff's petition filed by leave, to which action of the Court plaintiff objects and is granted an exception.

4- 3-45 Motion of defendant Q. W. S. S. Realty & Investment Company for judgment in condemnation for plaintiff and for judgment for defendants fixing compensation by option, together with interest, etc., filed.

4- 4-45 Motion of plaintiff for judgment in condemnation and for judgment for defendants fixing compensation by option, argued and submitted on briefs to be presented; brief of movant forthwith submitted; defendants granted two weeks within which to submit answering brief and plaintiff five days thereafter within which to submit reply brief.

4-12-45 Petition of Blatchford Downing, Esq., attorney for R. Newton McDowell for leave to file brief as amicus curiae in support of proposition that land owners are entitled to interest on award from date of taking filed and proposed brief lodged therewith.

4-17-45 Petition heretofore filed of Blatchford Downing, Esq., as attorney for R. Newton McDowell to file brief lodged therewith as amicus curiae in support of proposition that land owners are entitled

to interest on award from date of taking, taken as submitted and said petition granted and aforesaid brief of petitioner heretofore lodged as aforesaid taken as presented.

5-17-45 Plaintiff tenders into Court to the use and benefit of persons entitled thereto, deficiency in the sum of $36,720.00, which sum is deposited by the Clerk in the Registry.

6- 4-45 Claim of R. Newton McDowell filed.

6- 7-45 Supplemental claim of U. S. asserted against any payment herein to R. Newton McDowell filed.

8- 9-45 Amended claim of the United States of America, filed.

8-14-45 Motion of Reconstruction Finance Corporation to intervene, together with proposed intervening petition of said Reconstruction Finance Corporation, filed.

8-23-45 Order of Hon. R. M. Duncan fixing September 8, 1945 as the time for filing of intervening petitions and fixing September 11, 1945 as the time for hearings thereof, received, filed and entered.

8-27-45 Affidavit of U. S. Attorney as to mailing a copy of notice to file intervening petitions respecting claim to money on deposit in the Registry of the Court, filed.

[fol. 7] 9- 7-45 Clerk's return to posted notice, filed.

9- 7-45 Motion of National Refining Company to intervene, with proposed intervening petition attached, together with affidavit as to service of aforesaid motion to intervene, filed.

9- 7-45 Affidavit as to mailing of notice to defendants to file intervening petitions for distribution of sum on deposit in Registry and of date set for hearing same, filed by plaintiff.

9- 8-45 Intervening petition of Globe Indemnity Company, filed.

9- 8-45 Claim of defendant Q. W. S. S. Realty & Investment Company to award filed.

9-11-45 Intervening petition of R. Newton McDowell heard, submitted and allowed in the sum of 5% of option price. Intervening petition of Kansas City Title Insurance Company continued to October 5, 1945 at ten A. M. Cause submitted for entry of order of distribution to record owners subject to claim of Kansas City Title Insurance Company.

9-14-45 Separate motions of National Refining Company and Reconstruction Finance Corporation to intervene, sustained and separate intervening petitions of aforesaid parties thereupon filed. Winston H. Woodson, Esq., attorney for Globe Indemnity Company and United States of America for and on behalf of Internal Revenue Collector of the 6th Collection District of Missouri, granted ten days from this date within which to file intervening petition herein.

10 -5-45 Samuel M. Watson, Esq., attorney for defendants landowners, orally consents to allowance of claim of Kansas City Title Insurance Company at 1½% of option price, and said claim allowed. Cause submitted for order of distribution to record owners.

November 26,—Order of partial distribution filed and entered.

November 26,—Findings and judgment filed and entered awarding plaintiff judgment in condemnation as well as awarding judgment for defendants fixing compensation, etc.

November 27,—Motion of plaintiff for a new trial filed.

November 27,—Motion of plaintiff for a new trial submitted by plaintiff, taken as submitted by defts. and overruled.

November 28,—Plaintiff's notice of appeal to the United States Circuit Court of Appeals, 8th Circuit, from final judgment entered herein

November 26, 1945 filed and copy of said notice forthwith mailed by the Clerk of the Court to Samuel M. Watson, Esq., atty. of record for landowner defendant.

December 7,—Appellant's designation of record and (2) statement of points to be relied upon on appeal, filed.

[fol. 8] Petition in Condemnation.

(Filed April 9, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

Petition In Condemnation.

United States Of America, Plaintiff,
Docket No. 800. vs. At Law.
Tract No. 174

356.51 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known as Tract No. 174, and

Q. W. S. S. Realty And Investment Company, a corporation

Collector Of Revenue Of St. Charles County, Missouri

County Of St. Charles, State Of Missouri, Defendants.

(H. H. Steed, Trustee
Order (Union Savings Bank Of St. Charles
(State Of Missouri
7/24/41 (Darst Bottom Drainage And Protective District
(No. 2
(Henry W. Mette

Order (William Wackher, otherwise known as W.
4/ 8/42 (Wackher, otherwise known as William Wack-
(her

(James S. Martin, if living, or if dead, then the
(Unknown Consort, heirs, devisees, donees,
(alienees, assignees and immediate, mesne or

	(	remote, voluntary or involuntary grantees of
Order	(	the said James S. Martin
	(	
	(	The Unknown Owner and Holder of Note for
	(	$5000.00, dated June 17, 1925, secured by
12/12/42	(	Deed of Trust in Book 150, page 128, of the
	(	deed records of St. Charles County, Missouri,
	(	in favor of Union Savings Bank of St.
	(	Charles

[fol. 9] To The Honorable, The Judges Of The United States District Court For The Eastern District Of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and M. Walker Cooper, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Secretary of War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized and empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in

fee simple absolute of the land hereinafter described and the title thereto, which real estate is located as aforesaid, and is authorized and directed to be brought by the Secre-
[fol. 10] tary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257); and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940, (Public No. 667—76th Congress); and the Act of Congress approved September 24, 1940, (Publ. Ros. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United States and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

[fol. 11] Order 3-4-42

Amended Description
Case No. 800
Tract No. 174

A tract of land located partly within U. S. Surveys Nos. 476, 1670, and 3106, Twp. 45 N. R. 2 & 3 E., and more particularly described as follows:

Beginning at a point on the Eastern line of Survey No. 476, said point bearing S. 22° 22′ W. 2.75 chains from the N. E. corner of said Survey No. 476; thence N. 86° 58′ E. 6.92 chains to a point; thence N. 55° 03′ E. 7.56 chains to a point; thence S. 61° 39′ E. 15.27 chains to a point on the northwestern right-of-way line of State Highway No. 94; thence along said right-of-way line N. 35° 25′ E. 3.04 chains to point of curvature; thence northeastwardly along a curve of said Highway, having a radius of 7.146 chains, thru a central angle of 36° 20′ to the right, a distance of 4.53 chains to point of tangent of said right-of-way curve; thence N. 71° 45′ E. 7.40 chains to a point on said right-of-way line; thence S. 67° 12′ E. 7.67 chains to a point; thence N. 56° 17′ E. 4.92 chains to a point; thence S. 55° 27′ E. 3.00 chains to a point in the center line of the Missouri, Kansas and Texas right-of-way; thence N. 58° 15′ E. along said center line 28.16 chains to a point; thence S. 66° 36′ E. 8.97 chains to a point on the left bank of the Missouri River; thence along the left bank of said river and the property now or formerly of Mitchell Castlio the following courses and distances: S. 37° 05′ W. 6.50 chains S. 18° W. 7.10 chains and S. 24° 30′ W. 5.41 chains to the property of said Castlio; thence along said property line the following courses and distances: N. 43° W. 4.22 chains to a point; thence N. 68° 38′ W. 2.51 chains to a point; thence N. 89° 49′ W. 3.90 chains to a point; thence S. 72° 29′ W. 2.88 chains to a point; thence S. 66° 12′ W. 7.79 chains to a point; thence S. 6.2′ W. 5.02 chains to a point; thence S. 78° 30′ W. 7.63 chains to a point; thence west 5.54 chains to a point on the southeast right-of-way line of said Missouri, Kansas and Texas Railroad; thence S. 57° 30′ W. along said right-of-way line 3.56 chains to a point; thence S. 17° 30′ W. 7.82 chains to a point; thence S. 23° 30′ E. 8.56 chains to a point in the center line of Femme Osage Creek; thence along the center line of said creek the following courses and distances: N. 75° E. 2.18 chains; N. 64° E. 6.81 chains; N. 60° 45′ E. 3.84 chains; N. 59° 30′ E. 10.30 chains; N. 71° E. 2.18 chains; N. 88° E. 3.70 chains; East 2.31 chains and N. 75° E. 6.10 chains to a point at the intersection of said center line of said creek with the left bank of the Missouri River; thence along the left bank of said river S. 33° 30′ W. 26.90 chains to a point; thence N. 68° W. along the prolongation of the northern line of U. S.

Survey No. 1670, 1.08 chains to an iron bar at the northeast corner of said Survey No. 1670; thence S. 22° W. 15.98 chains to a point; thence N. 68° W. 39.25 chains to a point; thence S. 22° W. 14.37 chains to a point; thence N. 68° W. 17.24 chains to a point; thence S. 22° W. 28.72 chains to a point; thence S. 68° E. 1.39 chains to a point; thence S. 22° W. 11.11 chains to a point in the southern line of Survey No. 1670, which line is also the northern line of U. S. Survey No. 44; thence N. 68° W. along said survey line 9.10 chains; thence N. 22° 22′ E. along the western line of Survey No. 1670 and the Eastern line of Survey No. 476, 14.50 chains to a point on the right bank of the Femme Osage Creek; thence along the right bank of said creek the following courses and distances: N. 54° 16′ W. 1.74 chains; N. 34° 44′ W. 5.50 chains; N. 51° 31′ W. 1.55 chains; N. 36° 13′ W. 1.60 chains; N. 8° 51′ W. 1.15 chains; N. 13° 28′ E. 2.42 chains; N. 45° 45′ E. 1.61 chains;

[fol. 12] Tract No. 174.

(A)

Tract No. 174 containing 356.51 acres of land, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

A tract of land located partly within U. S. Surveys Nos. 476, 4670 and 3106, and more particularly described as follows: Beginning at the corner in the line between U. S. Survey No. 476 and Survey No. 3106, at a distance of 2.75 chains, South 22 degrees West from the northeast corner of said Survey No. 476, running thence from said beginning point North 86 degrees 58 minutes East 6.92 chains; thence North 55 degrees 3 minutes East 22.39 chains; thence South 67 degrees 12 minutes East 23.67 chains; thence North 56 degrees 17 minutes East 4.92 chains; thence South 55 degrees 27 minutes East 3 chains to a point in the center of the M. K. and T. Railroad Track; thence North 58 degrees 13 minutes East 28.16 chains along and with the center line of said Railroad track to a point; thence South 66 degrees 36 minutes East 8.88 chains more or less, to the bank of the Missouri River; thence South and westward along and with the bank of the Missouri River to a point in the extended southern line of U. S. Survey No. 3106; thence North with the southern line of Survey No. 3106,

68 degrees West 415.4 feet, more or less, to the northeast corner of survey 1670; thence South 22 degrees West 15.98 chains; thence North 68 degrees 0′ minutes West 800 feet, more or less; thence North 68 degrees West 39.25 chains; thence South 22 degrees West 14.37 chains; thence North 68 degrees West 24.95 chains; thence South 22 degrees west 28.72 chains to a stone at the southwest corner of a tract of land now or formerly belonging to the heirs of F. M. Taylor, deceased; thence South 68 degrees East 1.39 chains to a stone; thence South 22 degrees West 11.11 chains to a stone in the northern line of U. S. Survey No. 44; thence along the line between U. S. Survey No. 44 and Survey No. 1670 North 68 degrees West 9.10 chains to the southwest corner of U. S. Survey No. 1670; thence North on the line between U. S. Survey No. 476 and Survey No. 1670, 22 degrees 22 minutes East to a point on the eastern bank of the Femme Osage Creek; thence following the bank of said Femme Osage Creek to a point where same intersects the line between U. S. Survey No. 476 and Survey No. 1670; thence North 22 degrees 22 minutes East 37.44 chains, more or less, to the point of beginning;

A strip of land in U. S. Survey No. 1670, Township 45 North, Range 2 East as a right of way for road purposes described as follows: Beginning at the County Road at the northeast corner of U. S. Survey No. 44; thence extending westwardly along the line between said surveys 44 and 1670 15.04 chains to the line of the tract of land owned by Fritz Hueffmeier; thence extending northwardly 12 feet along said line; thence extending eastwardly parallel with the line between Surveys 44 and 1670 N. 61° 53′ E. 2.63 [fol. 13] chains; N. 54° 56′ E. 4.67 chains; N. 62° 15′ E., 1.88 chains; N. 54° 01′ E. 2.81 chains; N. 47° 44′ E. 1.50 chains; N. 41° 49′ E. 2.33 chains; N. 36° 42′ E. 3.73 chains and N. 47° 56′ E. 0.66 chains to a point in the western line of said Survey No. 1670; thence N. 22° 22′ E. along said survey line, 35.69 chains to the point of beginning, said tract containing 311 acres, more or less, exclusive of State Highway No. 94 and the Missouri, Kansas and Texas Railroad right-of-way and subject to all existing highways and public utility easements.

Also a 12-foot (or 0.182 chain) strip, being part of U. S. Survey No. 1670, Twp. 45 N. R. 2 E., and more particularly

described as follows: Beginning at a point in the center line of a county road, which point is also the Northeast corner of U. S. Survey No. 44; thence N. 68° W. along the north line of said Survey No. 44 and south line of U. S. Survey No. 1670, 15.85 chains to a point; thence No. 22° E. 0.182 chains to a point; thence S. 68° E. 15.85 chains to a point in the center line of said county road; thence S. 22° W. along said center line 0.182 chains to the place of beginning, containing .288 of an acre, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 14] 15.04 chains to the County Road and thence extending southwardly 12 feet along said County Road to the place of beginning.

Excepting from the above, a tract of land described as located partly within U. S. Surveys No. 476, No. 1670 and No. 3106, and more particularly described as follows: beginning at the corner in the line between U. S. Survey No. 476 and Survey No. 3106, at a distance of 2.75 chains, South 22 degrees West from the Northeast corner of said Survey No. 476, running thence from said beginning point North 86 degrees 58 minutes East 6.92 chains, thence North 55 degrees 3 minutes East 22.39 chains; thence South 67 degrees 12 minutes East 35.26 chains to a point in the beginning point of the tract of land herein described; thence South 62 degrees West 5.02 chains; thence South 78 degrees 30 minutes West 6.73 chains; thence West 5.54 chains; thence South 57 degrees 30 minutes West 3.56 chains; thence South 17 degrees 30 minutes West 7.82 chains; thence South 23 degrees 30 minutes East 8.56 chains; thence North 75 degrees East 3.78 chains; thence North 64 degrees East 6.81 chains; thence North 60 degrees 45 minutes East 3.84 chains; thence North 59 degrees 30 minutes East 10.30 chains; thence North 71 degrees East 2.18 chains; thence North 88 degrees East 3.70 chains; thence East 2.31 chains; thence North 75 degrees East 5.50 chains; thence North 73 degrees East 2.21 chains; thence North 29 degrees 30 minutes East 7.58 chains; thence North 43 degrees West 5.30 chains; thence North 68 degrees 38 minutes West 2.51 chains; thence North 89 degrees 49 minutes West 3.90 chains; thence South 72 degrees 29 minutes West 2.88 chains; thence South 66 de-

grees 12 minutes West 7.79 chains; to the point of beginning, containing 50 acres, and formerly belonging to Mitchell Castlio.

Excepting also a tract of land in U. S. Survey No. 3106 Township 45 North, Ranges 2 and 3 East, more particularly described as follows: beginning at a point on the western line of said U. S. Survey No. 3106 distant 7.25 chains North 22 degrees 22 minutes East from the southwestern corner of said Survey; thence North 86 degrees 58 minutes East 6.92 chains; thence North 55 degrees 03 minutes East 7.86 chains to an iron pipe, which iron pipe marks the beginning point of the tract of land herein described; thence continuing along said line North 55 degrees 3 minutes East 14.53 chains to an iron rod; thence South 67 degrees 12 minutes East 16 chains to an iron pipe in the northwesterly right-of-way line of Missouri State Highway S. E.; thence along said right-of-way line as follows: South 71 degrees 45 minutes West 7.40 chains to a point of curvature of station 266 plus 10.1; thence southwesterdwardly along a curve having a radius of 7.146 chains through a central angle of 36 degrees 20 minutes to the left, a distance of 4.53 chains to a point of tangent at station 268 plus 89.6; thence South 35 degrees 25 minutes West 3.04 chains to an iron pipe in said right-of-way line; thence North 69 degrees 31 minutes West 15.27 chains to the place of beginning, containing 16.95 acres.

The above described land being situated in St. Charles County, Missouri, and contains 356.51 acres, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 15] (B)

That the following defendant owns or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

Q. W. S. S. Realty and Investment Company, a corporation

(H. H. Steed, Trustee
Order (Union Savings Bank of St. Charles
(State of Missouri
7/24/41 (Darst Bottom Drainage and Protective District
(No. 2
(Henry W. Mette

Order 4/8/42 (Willie Wackher, otherwise known as W. Wackher, otherwise known as William Wackher

(James S. Martin, if living, or if dead, then the Unknown Consort, heirs, devisees, donees, alienees, assignees and immediate, mesne or remote, voluntary or involuntary grantees of

Order 12/12/42 the said James S. Martin

(The Unknown Owner and Holder of Note for $5000.00, dated June 17, 1925, secured by Deed of Trust in Book 150, page 128, of the deed records of St. Charles County, Missouri, in favor of Union Savings Bank of St. Charles

[fol. 16] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Collector of Revenue of St. Charles County, Missouri, are, therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands, each claim and assert, or may claim and assert a reversionary interest in and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and claimants to easements in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendant, as hereinabove specifically named, if known, and if unknown, such unknown persons by the description of the "Unknown Owners" of the land herein

described and to be condemned, to the end that they may come into court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

Eleventh: That your petitioner has attempted to set forth the interest or estates of all persons, firms and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporations having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that all of their rights, title, interests and estate, whatever it may [fol. 17] be, to all and singular, the premises above mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident defendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts [appropos] to this proceeding and the provisions of the law applicable thereto, under which this action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants; that the Court will decree to this plaintiff the

right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that those defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court, upon the filing of this petition, will make an order pursuant [fol. 18] to the Act of Congress approved February 26, 1931. (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servants, agents and employees, may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interest therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief in the premises to which this petitioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney for the Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri.

M. WALKER COOPER,
Special Assistant to the United States Attorney,
410 New Federal Building,
St. Louis, Missouri.

[fol. 19] United States of America,
Eastern District of Missouri—ss.:

Before me, the undersigned, personally appeared Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the petition.

HARRY C. BLANTON.

Subscribed and sworn to before me, this 9th day of April, 1941.

(Seal)

JAMES J. O'CONNOR,
Clerk of U. S. District Court
in and for the Eastern District of Missouri.
By C. E. Rudolph, Deputy.

[fol. 20] Declaration of Taking.

(Filed April 7, 1941.)

In the United States District Court in and for the Eastern District of Missouri.

United States of America, Petitioner,
Case No. 770. vs.
1,710.54 Acres of Land, More or Less, Situate in St. Charles County, State of Missouri, and Vincent Lonergan, et al., Defendants.

To the Honorable,
The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved July 2, 1917, as amended by the Act of Congress approved April 11, 1918 (50 U. S. C. sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act

of Congress approved June 26, 1940 (Public No. 667—76th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for such other uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use. [fol. 21] 2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject, however, to all existing rights for easements for public roads, pipe lines and public utilities, in, across and over the lands acquired.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 3rd day of April, A. D. 1941, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

[fol. 22] Schedule "A"

The land which is the subject matter of this Declaration of Taking and of this condemnation aggregate 1,710.54 acres, more or less, situate and being in the County of St. Charles, State of Missouri. A description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

[fol. 23] Tract No. 174.

A tract of land located partly within U. S. Surveys Nos. 476, 1670 and 3106, and more particularly described as follows: Beginning at the corner in the line between U. S. Survey No. 476 and Survey No. 3106, at a distance of 2.75 chains, South 22 degrees West from the northeast corner of said Survey No. 476, running thence from said beginning point North 86 degrees 58 minutes East 6.92 chains; thence North 55 degrees 3 minutes East 22.39 chains; thence South 67 degrees 12 minutes East 23.67 chains; thence North 56 degrees 17 minutes East 4.92 chains; thence South 55 degrees 27 minutes East 3 chains to a point in the center of the M. K. and T. Railroad Track; thence North 58 degrees 13 minutes East 28.16 chains along and with the center line of said Railroad track to a point; thence South 66 degrees 36 minutes East 8.88 chains more or less, to the bank of the Missouri River; thence South and westward along and with the bank of the Missouri River to a point in the extended southern line of U. S. Survey No. 3106; thence North with the southern line of Survey No. 3106, 68 degrees West 415.4 feet, more or less, to the northeast corner of survey 1670; thence South 22 degrees West 15.98 chains; thence North 68 degree 0 minutes West 800 feet, more or less; thence North 68 degrees West 39.25 chains; thence South 22 degrees West 14.37 chains; thence North 68 degrees West 24.95 chains; thence South 22 degrees west 28.72 chains to a stone at the southwest corner of a tract of land now or formerly belonging to the heirs of F. M. Taylor, deceased; thence South 68 degrees East 1.39 chains to a stone; thence South 22 degrees West 11.11 chains to a stone in the northern line of U. S. Survey No. 44; thence along the line between U. S. Survey No.

44 and Survey No. 1670 North 68 degrees West 9.10 chains to the southwest corner of U. S. Survey No. 1670; thence North on the line between U. S. Survey No. 476 and Survey No. 1670, 22 degrees 22 minutes East to a point on the eastern bank of the Femme Osage Creek; thence following the bank of said Femme Osage Creek to a point where same intersects the line between U. S. Survey No. 476 and Survey No. 1670; thence North 22 degrees 22 minutes East 37.44 chains, more or less, to the point of beginning;

A strip of land in U. S. Survey No. 1670, Township 45 North, Range 2 East as a right of way for road purposes described as follows: beginning at the County Road at the northeast corner of U. S. Survey No. 44; thence extending westwardly along the line between said surveys 44 and 1670 15.04 chains to the line of the tract of land owned by Fritz Hueffmeier; thence extending northwardly 12 feet along said line; thence extending eastwardly parallel with the line between Surveys 44 and 1670 15.04 chains [fol. 24] to the County Road and thence extending southwardly 12 feet along said County Road to the place of beginning.

Excepting from the above, a tract of land described as located partly within U. S. Surveys No. 476, No. 1670 and No. 3106, and more particularly described as follows: beginning at the corner in the line between U. S. Survey No. 476 and Survey No. 3106, at a distance of 2.75 chains, South 22 degrees West from the Northeast corner of said Survey No. 476, running thence from said beginning point North 86 degrees 58 minutes East 6.92 chains, thence North 55 degrees 3 minutes East 22.39 chains; thence South 67 degrees 12 minutes East 35.26 chains to a point in the beginning point of the tract of land herein described; thence South 62 degrees West 5.02 chains; thence South 78 degrees 30 minutes West 6.73 chains; thence West 5.54 chains, thence South 57 degrees 30 minutes West 3.56 chains; thence South 17 degrees 30 minutes West 7.82 chains; thence South 23 degrees 30 minutes East 8.56 chains; thence North 75 degrees East 3.78 chains; thence North 64 degrees East 6.81 chains; thence North 60 degrees 45 minutes East 3.84 chains; thence

North 59 degrees 30 minutes East 10.30 chains; thence North 71 degrees East 2.18 chains; thence North 88 degrees East 3.70 chains; thence East 2.31 chains; thence North 75 degrees East 5.50 chains; thence North 73 degrees East 2.21 chains; thence North 29 degrees 30 minutes East 7.58 chains; thence North 43 degrees West 5.30 chains; thence North 68 degrees 38 minutes West 2.51 chains; thence North 89 degrees 49 minutes West 3.90 chains; thence South 72 degrees 29 minutes west 2.88 chains; thence South 66 degrees 12 minutes West 7.79 chains; to the point of beginning, containing 50 acres, and formerly belonging to Mitchell Castlio.

Excepting also a tract of land in U. S. Survey No. 3106 Township 45 North, Ranges 2 and 3 East, more particularly described as follows: beginning at a point on the western line of said U. S. Survey No. 3106 distant 7.25 chains North 22 degrees 22 minutes East from the southwestern corner of said Survey; thence North 86 degrees 58 minutes East 6.92 chains; thence North 55 degrees 03 minutes East 7.86 chains to an iron pipe, which iron pipe marks the beginning point of the tract of land herein described; thence continuing along said line North 55 degrees 3 minutes East 14.53 chains to an iron rod; thence South 67 degrees 12 minutes East 16 chains to an iron pipe in the northwesterly right-of-way line of Missouri State Highway S. E.,; thence along said right-of-way line as follows: South 71 degrees 45 minutes West 7.40 chains to a point of curvature of station 266 plus 10.1; thence southwestwardly along a curve having a radius of 7.146 chains through a central angle of 36 degrees 20 minutes to the left, a distance of 4.53 chains to a point of tangent at station 268 plus 89.6; thence South 35 degrees 25 minutes West 3.04 chains to an iron pipe in said right-of-way line; thence North 69 degrees 31 minutes West 15.27 chains to the place of beginning, containing 16.95 acres.

The above described land being situated in St. Charles County, Missouri, and contains 356.61 acres, more or less.

Name of Purported Owner: Q. W. S. S. Realty and Investment Co.

Estimated Compensation: $15,280.00.

[fol. 25] Order and Judgment on Declaration of Taking.

(Filed April 9, 1941.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 800. vs. At Law.
356.61 Acres of Land, More or Less, Situate in St. Charles County, State of Missouri, Known as Tract No. 174 and Q. W. S. S. Realty and Investment Company, a corporation, et al., Defendants.

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter a judgment herein on the Declaration of Taking filed in Case No. 770 on April 7, 1941, and upon consideration of said motion, and the condemnation petition filed herein, and the Declaration of Taking filed in said Cause No. 770. the Court, having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land described in said petition, and also under authority of the Attorney General of the United States:

Second: That said Petition filed herein and the Declaration of Taking heretofore filed in Cause No. 770 state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United States of America, for the purposes therein set forth;

[fol. 26] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in the said Declaration of Taking;

Fourth: That the said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use:

Fifth. That a map or plan showing the land taken is annexed to and made a part of the said Declaration of Taking;

Sixth: That a statement is contained in the said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 174, in the amount of Fifteen Thousand Two Hundred Eighty Dollars and No Cents ($15,280.00) and that said sum was deposited in the Registry of this Court in Case No. 770 to the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking:

Seventh. That a statement is contained in the said Declaration of Taking that the amount of the ultimate award of compensation for Tract No. 174, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor,

It Is Therefore Ordered and Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of the said Declaration of Taking and depositing in the Registry of this Court of the aforesaid estimated compensation, which land is situated in St. Charles County, Missouri, and described as follows:

[fol. 27] Tract No. 174.

Tract No. 174 containing 356.51 acres of land, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

A tract of land located partly within U. S. Surveys Nos. 476, 1670 and 3106, and more particularly described as follows: Beginning at the corner in the line between U. S. Survey No. 476 and Survey No. 3106, at a distance of 2.75 chains, South 22 degrees West from the northeast corner of said Survey No. 476, running thence from said beginning point North 86 degrees 58 minutes East 6.92 chains; thence North 55 degrees 3 minutes East 22.39 chains; thence South 67 degrees 12 minutes East 23.67

chains; thence North 56 degrees 17 minutes East 4.92 chains; thence South 55 degrees 27 minutes East 3 chains to a point in the center of the M. K. and T. Railroad Track; thence North 58 degrees 13 minutes East 28.16 chains along and with the center line of said Railroad track to a point; thence South 66 degrees 36 minutes East 8.88 chains more or less, to the bank of the Missouri River; thence South and westward along and with the bank of the Missouri River to a point in the extended southern line of U. S. Survey No. 3106; thence North with the southern line of Survey No. 3106, 68 degrees West 415.4 feet, more or less, to the northeast corner of survey 1670; thence south 22 degrees West 15.98 chains; thence North 68 degrees 0 minutes West 800 feet, more or less; thence North 68 degrees West 39.25 chains; thence South 22 degrees West 14.37 chains; thence North 68 degrees West 24.95 chains; thence South 22 degrees west 28.72 chains to a stone at the southwest corner of a tract of land now or formerly belonging to the heirs of F. M. Taylor, deceased; thence South 68 degrees East 1.39 chains to a stone; thence South 22 degrees West 11.11 chains to a stone in the northern line of U. S. Survey No. 44; thence along the line between U. S. Survey No. 44 and Survey No. 1670 North 68 degrees West 9.10 chains to the southwest corner of U. S. Survey No. 1670; thence North on the line between U. S. Survey No. 476 and Survey No. 1670, 22 degrees minutes East to a point on the eastern bank of the Femme Osage Creek; thence following the bank of said Femme Osage Creek to a point where same intersects the line between U. S. Survey No. 476 and Survey No. 1670; thence North 22 degrees 22 minutes East 87.44 chains, more or less, to the point of beginning;

A strip of land in U. S. Survey No. 1670, Township 45 North, Range 2 East as a right of way for road purposes described as follows: beginning at the County Road at the northeast corner of U. S. Survey No. 44; thence extending westwardly along the line between said surveys 44 and 1670 15.04 chains to the line of the tract of land owned by Fritz Hueffmeier; thence extending northwardly 12 feet along said line; thence extending eastwardly parallel

with the line between Surveys 44 and 1670 15.04 chains [fol. 28] to the County Road, and thence extending southwardly 12 feet along said County Road to the place of beginning.

Excepting from the above, a tract of land described as located partly within U. S. Surveys No. 476, No. 1670 and No. 3106, and more particularly described as follows: beginning at the corner in the line between U. S. Survey No. 476 and Survey No. 3106, at a distance of 2.75 chains South 22 degrees West from the Northeast corner of said Survey No. 476, running thence from said beginning point North 86 degrees 58 minutes East 6.92 chains, thence North 55 degrees 3 minutes East 22.39 chains; thence South 67 degrees 12 minutes East 35.26 chains to a point in the beginning point of the tract of land herein described; thence South 62 degrees West 5.02 chains; thence South 78 degrees 30 minutes West 6.73 chains; thence West 5.54 chains; thence South 57 degrees 30 minutes West 3.56 chains; thence South 17 degrees 30 minutes West 7.82 chains; thence South 23 degrees 30 minutes East 8.56 chains; thence North 75 degrees East 3.78 chains; thence North 64 degrees East 6.81 chains; thence North 60 degrees 45 minutes East 3.84 chains; thence North 59 degrees 30 minutes East 10.30 chains; thence North 71 degrees East 2.18 chains; thence North 88 degrees East 3.70 chains; thence East 2.31 chains; thence North 75 degrees East 5.50 chains; thence North 73 degrees East 2.21 chains; thence North 29 degrees 30 minutes East 7.58 chains; thence North 43 degrees West 5.30 chains; thence North 68 degrees 38 minutes West 2.51 chains; thence North 89 degrees 49 minutes West 3.90 chains; thence South 72 degrees 29 minutes west 2.88 chains; thence South 66 degrees 12 minutes West 7.79 chains; to the point of beginning, containing 50 acres, and formerly belonging to Mitchell Castlio.

Excepting also a tract of land in U. S. Survey No. 3106 Township 45 North, Ranges 2 and 3 East, more particularly described as follows: beginning at a point on the western line of said U. S. Survey No. 3106 distant 7.25 chains North 22 degrees 22 minutes East from the southwestern corner of said Survey; thence North 86 degrees 58 minutes

East 6.92 chains; thence North 55 degrees 03 minutes East 7.86 chains to an iron pipe; which iron pipe marks the beginning point of the tract of land herein described; thence continuing along said line North 55 degrees 3 minutes East 14.53 chains to an iron rod; thence South 67 degrees 12 minutes East 16 chains to an iron pipe in the northwesterly right-of-way line of Missouri State Highway S. E.; thence along said right-of-way line as follows: South 71 degrees 45 minutes West 7.40 chains to a point of curvature of station 266 plus 10.1; thence southwestwardly along a curve having a radius of 7.146 chains through a central angle of 36 degrees 20 minutes to the left, a distance of 4.53 chains to a point of tangent at station 268 plus 89.6; thence South 35 degrees 25 minutes West 3.04 chains to an iron pipe in said right-of-way line; thence North 69 degrees 31 minutes West 15.27 chains to the place of beginning, containing 16.95 acres.

The above described land being situated in St. Charles County, Missouri, and contains 356.51 acres, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 29] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered and Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the entry of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 9th day of April, 1941.

CHARLES B. DAVIS,
United States District Judge.

[fol. 30] Order Transferring Fund From the Declaration of Taking in Case No. 770.

(Filed April 9, 1941.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 800. vs. At Law.
Tract No. 174.

356.51 acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 174, and Q. W. S. S. Realty and Investment Company, a Corporation, et al., Defendants.

It appearing to the Court that in the Declaration of Taking filed with Case No. 770 on April 7th, 1941, there was paid into the Registry of the Court as estimated compensation for Tract No. 174, described in the petition filed herein, the amount of $15,280,00;

On oral motion of the United States Attorney, the Clerk of this Court is directed to transfer $15,280.00, of the whole amount deposited under the Declaration of Taking heretofore filed, to this cause for the use and benefit of the defendants entitled thereto as to Tract No. 174.

CHARLES B. DAVIS,
United States District Judge.

Dated, this 9th day of April, 1941.

[fol. 31] (Answer of Defendant, Q. W. S. S. Realty and Investment Company.)

(Filed May 19, 1941.)

Comes now Q. W. S. S. Realty and Investment Company, a corporation, defendant in the above entitled cause, by its attorneys, and, in answer to the petition of the plaintiff herein, denies each and every allegation therein contained.

Answering further, the said defendant states that because of the hereinafter stated possession and ownership in fee simple by the plaintiff of the land described in the said petition, the said land was removed entirely and permanently from the buying market prior to the filing of the

plaintiff's petition herein; that the said land at the date of such filing thus neither had, nor could have had, a reasonable value on the buying market; that the absence of such reasonable value renders impossible the ascertainment thereby of the amount of just compensation for the said land; that there is an utter absence of any precedent in the light of which the amount of such compensation may be determined; that such amount is impossible of ascertainment and, therefore, cannot be paid into the Reg- [fol. 32] istry of this Court; and that thus the prime requisite of this proceeding and of its alleged Declaration of Taking utterly fails.

Answering further, the said defendant states as follows, to-wit:

1. That the plaintiff's petition is inconsistent within itself in that it provides for the condemnation of the said land under Title 40, Section 257 of the United States Code, and under Title 50, Section 171 of the United States Code.

2. That Title 40, Section 257, United States Code, does not provide for the condemnation of land for an ordnance plant as set out in the plaintiff's petition.

3. That the plaintiff, under Title 50, Section 171, United States Code, has entered with the defendant into a valid contract which provides for the sale of the same land as that described in the said petition and which was duly accepted by and on behalf of the plaintiff by its duly authorized agent, which said contract, omitting the signatures thereto, is in words and figures as follows, to-wit:

W 766 QM
2870

Option to Purchase Land.

Know All Men By These Presents: That the undersigned Q-W-S-S Realty and Investment Co., for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell and convey to the Government for the consideration of Fifty-two Thousand Dollars ($52,000.00) that certain piece or

parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

1st. A tract of land lying on the North side of Femme Osage Creek, being part of surveys 3106 and 1670 described as follows, to-wit:—Beginning at the corner in the line between U. S. Surveys Nos. 476 and 3106 at a distance of 2.75 chains south 22 degrees West from the Northeast corner of said survey 476, running thence from said beginning point, North 22 degrees East 6.74 chains to a hickory 10 inches in diameter for corner, thence North 54½ degrees East 22.11 chains to a stake for corner, thence south [fol. 33] 68 degrees East 36 chains to a stake for corner in the middle of what was at one time the old channel of Femme Osage Creek; thence with old Channel of said Creek south 62 degrees West 5 chains, south 72½ degrees West 5.30 chains, south 82 degrees West 6.56 chains, south 74 degrees West 5.25 chains, south 21 degrees West 7.81 chains to the foot of an old bank of the Missouri River; thence following down the foot of said bank North 71 degrees East 13.04 chains, North 84 degrees East 10.61 chains and south 80 degrees East 4.00 chains to the present mouth of the Femme Osage Creek; thence following the meanders of said creek south 68 degrees West 7.60 chains, south 66 degrees West 17.81 chains, south 75½ degrees west 8.80 chains, West 8.57 chains, thence south 84 degrees West 14.39 chains, south 82 degrees West 4.67 chains, south 70 degrees West 3.04 chains, South 49 degrees West 4.13 chains, south 63 degrees West 3.08 chains, south 81 degrees West 8.42 chains to the East line of survey 476; thence with the east line North 22 degrees East 34 chains to the place of beginning, containing one hundred fifty-two (152) acres more or less, exclusive of the right of way of the Missouri-Kansas-and-Texas Railway; all according to a survey made by Carr Edwards former County Surveyor of St. Charles County in January, 1908 and being part of survey 3106 and parts of lots 3 and 4 of the partition among the heirs of Wm. Hays deceased, said lots 3 and 4 being parts of survey 1670, excepting from the above tract 16.95 acres conveyed to Thomas H. Rogers and wife as per deed recorded in the Recorder's Office of St. Charles County, Missouri, in Book 181 page 349 and excepting also from the above described real estate that land which

was conveyed to the State of Missouri for right-of-way purposes and subject to public roadways as now maintained and established.

2nd. Also another tract of land being part of Surveys Nos. 1670, 3106 and 476 in township 45 North Range 2 and 3 East bounded and more particularly described as follows: beginning at the Northwest corner of a tract of land belonging to Fred Hueffmeyer; thence along the North line of the farms of said Hueffmeyer and F. M. Taylor, South 68 degrees East 24.75 chains to corner; thence N. 22 degrees E. 14.20 chains to corner, thence S. 68 degrees E. 39.25 chains to corner; thence North 22 degrees East 15.98 chains to corner; thence South 68 degrees East 9.21 chains to corner on the bank of the Missouri River; thence down said stream North 26 degrees East 7.17 chains to corner; thence North 17¼ degrees East 14.50 chains to corner at mouth of Femme Osage Creek; [fol. 34] thence up center of said creek as follows: North 74 degrees W. 9.52 chains to corner, thence south 68 degrees West 7.60 chains to corner; thence South 68 degrees West 17.81 chains to corner; thence south 75½ degrees West 8.80 chains to corner; thence west 8.57 chains to corner 84 degrees West 14.39 chains to corner thence south 82 degrees West 4.67 chains to corner thence south 70 degrees West 3.04 chains to corner; thence south 49 degrees West 4.13 chains to corner; thence South 63 degrees West 3.08 chains to corner; thence south 81 degrees West 8.42 chains to corner; thence South 73 degrees West 2.97 chains to corner; thence South 37 degrees West 1.03 chains to corner thence south 26 degrees West 4.46 chains to corner; thence South 46 degrees West 4.41 chains to corner; thence South 66 degrees W. 8.58 chains to corner; thence South 38 degrees West 2.94 chains to corner; thence south 11 degrees West 2.34 chains to corner; thence south 11 degrees East 1.94 chains to thence south 27 degrees East 1.40 chains to corner; thence south 37 degrees East 2.99 chains to corner; thence south 38 degrees East 3.49 chains to corner; thence south 15 degrees East 4.47 chains to corner; thence South 23 degrees East 1.85 chains to last corner in said Femme Osage Creek; thence leaving said Creek North 22 degrees East 30 chains to the place of beginning, containing one hundred forty-eight and 73/100 (148.73) acres

more or less. Said above described real estate being the same real estate that was conveyed to A. W. Schaefer, et al. by Mathilda Lowe and Fred Lowe, her husband by Warranty Deed recorded in book 144 page 187 of Recorder's Office of St. Charles County, Missouri.

A tract of land in U. S. Survey No. 1670, township 45 North Range 2 East being parts of Lots Nos. 1 and 2 of the partition among the heirs of Wm. Hays, deceased and more particularly described as follows:—Beginning at a stone at the southwest corner of said U. S. Survey No. 1670; thence along the line between U. S. Survey No. 476 and said U. S. Survey No. 1670 North 22 degrees East 39.83 chains to a corner; thence south 68 degrees East 7.71 chains to a stone, thence South 22 degrees West 28.72 chains to a stone at the Southwest corner of a tract of land now or formerly belonging to the heirs of F. M. Taylor, deceased, thence south 68 degrees East 1.39 chains to a stone; thence South 22 degrees West 11.11 chains to a stone in the Northern line of U. S. Survey No. 44; thence along the line between said U. S. Survey No. 44 and Survey No. 1670 North 68 degrees West 9.10 chains to the place of beginning, containing 31.75 acres, more or less.

4th. Also a right of way over the land now or formerly [fol. 35] owned by William G. Sander, conveyed by said William G. Sander and wife to Fritz Hueffmeier by deed dated Sept. 20, 1913 and recorded in Book 93, page 540 of said recorder's office and more particularly described as follows:—A strip of land in U. S. Survey No. 1670, Township 45 North Range 2 East as a right of way for road purposes describing as follows: Beginning at the County road at the Northeast corner of U. S. Survey No. 44; thence extending westwardly along the line between said Surveys 44 and 1670, 15.04 chains to the line of the tract of land owned by Fritz Hueffmeier; thence extending Northwardly 12 feet along said line; thence extending eastwardly parallel with the line between survey 44 and 1670, 15.04 chains to the County road and thence extending southwardly 12 feet along said County road to the place of beginning, being the same real estate described in Book 144, page 257 of the Recorder's Office of St. Charles County, Missouri.

5th. A tract of land situated in U. S. Survey No. 3106, township 45 North Range 3 East more particularly de-

scribed as follows:—Beginning at a stake on the Femme Osage Creek from which a point on the Western line of said U. S. Survey No. 3106 distant 28.19 chains south 22 degrees 0′ West from the Northwestern corner of said U. S. Survey bears North 66 degrees 56′ West 73.42 chains; thence North 66 degrees 56′ West 8.88 chains to a point in the center line of the main track of the Missouri-Kansas-Texas Railroad; thence along the center line of said railroad track south 58 degrees 15′ West 19.91 chains to point in the Northern line of a tract of land owned by J. W. and A. W. Hiler, thence along said line south 67 degrees 12′ East 11.53 chains to a stake; thence south 32 degrees 28′ West 1.19 chains to a stake in the old bed of Femme Osage Creek; thence along said Creek Bed South 68 degrees 38′ East 2.51 chains; south 4 degrees 14′ West 5.89 chains, south 52 degrees 13′ East 2.59 chains to a stake on the present bank of said Femme Osage Creek; thence in a northerly direction along the present bank of said Femme Osage Creek to the place of beginning. Subject however to the right of way of said Missouri-Kansas-Texas Railroad 50 feet wide embraced in the above description and containing 26.50 acres, more or less exclusive of said right of way. Said above land is in accordance with a survey made by Fred R. Jacoby County Surveyor on September 27, 1926 about 16 acres of said land is [hight] bottom land and the rest is land by accretion. Said real estate being the same property conveyed to Arthur W. Schaefer et al. by Margaret A. Musehany, a widow et al. by Warranty Deed in the Recorder's Office of St. Charles County, Missouri in Book 153, page 376.

[fol. 36] 6th. A tract of land situated in U. S. Survey 3106, township 45 North, Range 3 East, more particularly described as follows:—Beginning at a point on the edge of a bluff in the northern line of a tract conveyed by Mathilda Lowe and Fred Lowe to A. W. Schaefer, R. H. Seib, Wm. Wackher and Charles W. Quint, by deed recorded in the Recorder's Office of St. Charles County, Missouri, in Book 144 page 187 from which point an iron rod bears North 67 degrees 12′ West 7 links and which point is distant 3.17 chains north 67 degrees 12′ West from the center line of the main track of the Missouri-Kansas and Texas Railroad; thence South 67 degrees 12′ East 11.59 chains to an iron rod in the old bed of the Femme Osage Creek from which a

Cotton wood 12 inches in diameter bears North 47 degrees 45′ West 25.7 feet and a cotton wood 30 inches in diameter bears South 88 degrees 0′ West 27.2 feet; thence along said Creek bed North 66 degrees 12′ East 7.79 chains, North 72 degrees 29′ East 2.88 chains south 89 degrees 49′ East 3.90 chains; thence leaving said creek bed, North 32 degrees 28′ East 1.19 chains to a stake, thence North 67 degrees 12′ West 15.70 chains to a point on the bluff; thence south 58 degrees 15′ West 12.54 chains to the place of beginning, subject, however, to right of way of said Missouri-Kansas-Texas Railroad 100 feet wide, and containing 12.81 acres, exclusive of said right of way, and being the same real estate conveyed to Arthur W. Schaefer et al. by J. Warren Hiler et al. by deed recorded in the Recorder's Office of St. Charles County, Missouri in Book 153 page 375, excepting therefrom a parcel of land containing 1.48 acres conveyed by Arthur W. Schaefer et al. to Currier Fridley by deed dated September 1, 1931, and recorded in the Recorder's Office of St. Charles County, Missouri, in Book 148, page 506.

7th. A strip of ground off of the Western end of a 30 acre tract of land described in a deed from Louis D. Dozier and wife et al. to Mitchel Castlio, dated Oct. 20, 1891 and recorded in the Recorder's Office of St. Charles County, Missouri in Book 56 page 378, more particularly described as follows: to-wit:—All that part of said 30 acre tract of land and of any accretion thereto lying Westwardly of the division line agreed upon as the dividing line between the lands of Quint, Wackher, Schaefer and Seib and the land of said Mitchell Castlio in U. S. Survey No. 3106, township 45 North, Range 2 East as per agreement dated June 10th, 1929 and recorded in the Recorder's Office of St. Charles County, Missouri in Book 163, page 314. Also any and all lands formed by accretion of the Missouri River northwardly of the middle of the former, old bed of Femme Osage Creek and eastwardly and Northwardly of a Quadrilateral tract of land containing 1.67 acres conveyed by Quint, Wachker, Schaefer and Seib to Mitchell Castlio by deed dated June 10, 1929 and recorded in the Recorder's Office of St. Charles County, Missouri in Book 163, page 314, to [fol. 37] any lands in U. S. Survey Nos. 1670 and 3106 Eastwardly of the Missouri Kansas and Texas Railroad,

save and excepting any accretions embraced within the said quadrilateral tract of 1.67 acres above referred to.

8th. An easement of a right of way as a means of passage between the lands of Quint, Wackher, Schaefer and Seib, lying southwardly of the 30 acre tract of land conveyed to Mitchell Castlio by Louis D. Dozier et al., and their lands lying Northwardly of said tract of land, said right of way being one rod wide, ½ of one rod on either side of the following described center line thereof; Beginning at a point on the division line between the lands of Quint, Wackher, Schaefer and Seib and Mitchell Castlio by agreement hereinabove referred to recorded in the Recorder's Office of St. Charles County, Missouri in Book 163 page 314, in survey No. 3106 at a distance of 1.66 chains S. 17½ degrees W. from its intersection with the south line of the right of way of the M. K. and T. Railroad and from which beginning point a cotton-wood tree 24" in diameter bears N. 15½ degrees E. distant 79 links and is further described as being N. 17½ degrees E. 6.16 chains from the terminus of a road, granted by Quint, Wackher, Schaefer and Seib to Mitchell Castlio, thence over said Castlio's land as follows: N. 40¾ degrees E. 84 links N. 57½ degrees E. 1.00 chain N. 75 degrees E. 6.37 chains N. 83¼ degrees E. 3.00 chains N. 10 degrees E. 1.00 chain to the middle line of the old bed of Femme Osage Creek at which point said road way abuts against the lands of Quint et al. lying to the North of the said old creek bed and which right of way is hereby granted to said Quint, Wackher, Schaefer and Seib as and to continue as an appurtenant to the land of said Quint, Wackher, Schaefer and Seib in U. S. Survey 3106 lying northward of said tract of land conveyed by Louis D. Dozier et al. to Mitchell Castlio and Easterly of the Missouri, Kansas and Texas Railroad for the passage of said Quint, Wackher, Schaefer and Seib, their heirs and assigns, including tenants and their servants, employees, livestock, tractors, vehicles, conveyances, machinery, crops and property to and from their lands in U. S. Survey No. 3106 in connection with the cultivation, use and occupancy thereof. Subject to the rights and privileges of Mitchell Castlio, his heirs and assigns to use said right of way as means of ingress and egress to their lands and the right to work, repair and improve said right of way on the part of Mitchell Castlio, his heirs and assigns.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a com-
[fol. 38] mission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said prop-

erty is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at St. Charles, Mo., this 25th day of November, 1940.

(Seal)

(Signed) Q-W-S-S REALTY AND INVESTMENT CO.
(Signed) A. W. Schaefer, President
Witness: (Signed) H. H. Seib, Secretary
(Signed) W. Wackher,
Member of Board of Directors

(Signed) D. M. Bolton
(Signed) D. M. Bolton
(Signed) D. M. Bolton

[fol. 39] Accepted by and on behalf of the United States of America this 30th day of November, 1940.

(Signed) R. D. VALLIANT,
Colonel, Q.M.C., United States Army.

4. That pursuant to the said contract the defendant granted possession of the said land to the plaintiff, and the plaintiff entered upon and took sole and complete possession thereof to the exclusion of the defendant, which possession has been continuous and still continues.

5. That pursuant to the said contract, the defendant caused a certificate of title to said land to be furnished the plaintiff.

6. That pursuant to the said contract the defendant executed a warranty deed conveying the said land to the plaintiff and delivered the said deed to the plaintiff through its duly authorized agent, and is ready and willing to record

the said deed and to furnish the plaintiff the final certificate of title referred to in the said contract.

7. That the plaintiff, by taking under the said contract the title to and the possession of the said land, has estopped itself from denying the validity of the said contract.

8. That the plaintiff, by entering into the said contract and by estopping itself from denying the validity thereof, is precluded from availing itself of condemnation under the said Title 50, Section 17, United States Code, except under the contingency, specified in the said contract, of non-approval by the Attorney General of the title to the said land, a contingency whereon the instant proceeding is not predicated.

[fol. 40] 9. That the instant proceeding and the alleged Declaration of Taking thereunder are unnecessary, unwarranted, illegal and void in view of the said possession of plaintiff and of the said delivery of warranty deed by the defendant to the plaintiff, under the said contract.

10. That the plaintiff has failed and refused to pay the defendant the price which it agreed to pay under the said contract.

11. That the defendant is deprived of the said agreed compensation for its property without due process of law and equal protection of the laws in violation of Section 1, Article XIV of the Constitution of the United States, and is deprived of said agreed compensation for its property without due process of law in violation of Section 30, Article II of the Constitution of the State of Missouri.

Answering further, the defendant states that the Order and Judgment heretofore made herein on the plaintiff's alleged Declaration of Taking is an improper Order and Judgment and should be vacated and set aside by the Court for the following reasons:

1. That the said alleged Declaration of Taking heretofore entered herein, if entered under Title 40, Section 258-a, United States Code, is illegal and void in that the said Section 257 does not provide for the condemnation of land for an ordnance plant referred to in the said petition.

2. That the said alleged Declaration of Taking, if entered under Title 50, Section 171, United States Code, is illegal and void in that the plaintiff has made no showing that the said land is acquired or is being acquired "in time of war, or the imminence thereof".

3. That the said Order and Judgment is illegal and void for the reasons that fee simple title to the said land was [fol. 41] prior thereto and now is vested in the plaintiff, and that the plaintiff took, prior to the said Order and Judgment, has held continuously, and now holds possession of the said land to the exclusion of the said defendant.

4. That the said alleged Declaration of Taking is predicated solely and entirely on the erroneously conceived and filed petition of the plaintiff, and is, therefore, illegal and void.

5. That the said alleged Declaration of Taking is null and void for the reasons hereinbefore fully set forth in the second paragraph, beginning on page 1, of this Answer.

Wherefore, defendant prays that this Court vacate and set aside its said Order and Judgment on the said alleged Declaration of Taking, deny the plaintiff's petition for condemnation of the said land for the uses and purposes set forth in the said petition, and discharge the said defendant with its costs.

SAMUEL M. WATSON,
OLIVER T. JOHNSON,
Attorneys for Defendant.

[fol. 42] Motion For Judgment For Plaintiff In Condemnation And For Defendants Fixing Compensation By Option.

(Filed March 20, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed in this cause and for defendants fixing defendants' compensation for the taking of said real estate in the amount named in the option, without interest, and as reasons for said motion states:

(1) That this suit was filed by plaintiff to acquire, by condemnation, the real estate described in the petition filed in this cause, that a Declaration of Taking was filed and the sum of $15,280.00 was deposited in the Registry of the Court as the estimated just compensation for said real estate;

(2) That prior to the filing of the petition in this cause the defendants and the plaintiff, through the War Department, had executed an option contract for the purchase by the United States of America from the defendants the said real estate for the sum of $52,000.00, being the amount of compensation fixed in said option contract;

(3) The United State Supreme Court in the case of Muschany vs. United States, 89 L. Ed. Adv. Op. 492 (1945) has held an option contract to be valid and binding, which option contract is identical with the provisions of the option [fol. 43] contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation;

(4) That the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands described in plaintiff's petition for the purposes therein defined and against the defendants named in this cause, and against each and all of them, jointly and severally, as their rights may appear, and that the defendants, and each and all of them, jointly and severally are entitled to compensation in solido in the sum of $52,000.00, without interest, being the full amount of the compensation mentioned in said option contract;

(5) That R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, under the terms and conditions of the said option contract, have, or may have, some right, title or interest in and to the said sum of $52,000.00 mentioned in said option contract.

Wherefore, plaintiff moves the Court to enter judgment in this cause for the condemnation of the said real estate, fixing the compensation to be paid by plaintiff to the defendants in the sum of $52,000.00, and directing plaintiff to pay into the Registry of the Court the deficiency of $36,720.00 and to make an order citing all persons and corpora-

tions, including the said R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, claiming an interest in the said fund to appear in this Court and to set up and file their claims therefor.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney

Dated this 20th day of March, 1945.

[fol. 44] Order Setting Motion For Judgment For Plaintiff In Condemnation And For Defendants Fixing Compensation By Option For Hearing.

(Filed March 20, 1945.)

On oral motion of the plaintiff, by its attorneys, it is Ordered by the Court that the Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option filed by plaintiff in this cause be and the same is hereby set for hearing on the 4th day of April, 1945;

It is further Ordered that the Order of Continuance entered in this cause on the 3rd day of February, 1945, continuing this cause to June 4, 1945 be and the same is hereby set aside;

And it is further Ordered that the plaintiff give notice of the date fixed for the hearing of said motion to all defendants in this cause and to their attorneys of record by mailing to each of said defendants, whose places of residence are known, and their attorneys and to R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option and a copy of this order, and by posting in the office of the Clerk of this Court in the City of St. Louis, Missouri a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option, together with a copy of this order, at least ten

days before the time fixed in this order for the hearing of said motion.

R. M. DUNCAN,
United States District Judge.

Dated this 20th day of March, 1945.

[fol. 45] (Amended Answer of Defendant Q. W. S. S. Realty and Investment Co.)

(Filed April 2, 1945.)

Comes now Q. W. S. S. Realty and Investment Company, a corporation, defendant in the above entitled cause, by its attorney, and in this its Amended Answer, filed by leave of Court, to the petition of plaintiff herein, consents to the condemnation of the land described in plaintiff's said petition.

Answering further, the said defendant states as follows, to-wit:

1. That prior to the filing of the within suit plaintiff, under Title 50, Section 171, U. S. Code, entered with the defendant into a contract which provides for the sale of the same land as that described in said petition and which was duly accepted by and on behalf of the plaintiff by its duly authorized agent on, to-wit, the 30th day of November, 1940, a copy of which, marked "Exhibit A", is attached hereto and made a part hereof.

2. That pursuant to said contract, the defendant granted possession of the said land to plaintiff on the 30th day of November, 1940, and plaintiff, having theretofore entered [fol. 46] upon and taken possession of said land, thereafter remained and yet remains in exclusive and undisputed possession thereof.

3. That pursuant to the said contract, the defendant caused a certificate of title to the said land to be furnished the plaintiff and delivered a warranty deed conveying said land to the plaintiff through The Kansas City Title Insurance Company, plaintiff's duly authorized agent, and has at all times since stood ready to perform all of its duties under said contract which were to be performed either be-

fore or after rendition of a title opinion of the Attorney General setting forth his title requirements.

4. Defendant says that plaintiff did not at any time inform it as to any opinion of the Attorney General with reference to title to the land described in said contract and that plaintiff has withheld from this defendant the amount of $52,000.00 named as the purchase price therein.

5. Defendant, answering further, says that the terms and provisions of the aforesaid contract, and, among others, the following provision:

"If for any reason the title to the land is not approved by the Attorney-General, the Government will proceed to acquire the land by condemnation proceeding instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option, and will, upon filing its petition in such proceedings, deposit said agreed purchase price with the Clerk of said Court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

are applicable in this proceeding.

Wherefore, defendant prays that the prayer in plaintiff's petition for the appointment of three disinterested commissioners to fix compensation be denied and that the judgment entered in the within condemnation proceeding shall award compensation in the amount of $52,000.00 as a consent verdict, fixed in accordance with the agreement be- [fol. 47] tween this defendant and the plaintiff herein, embodied in the aforesaid contract, as to the amount of compensation for said land, and shall award an additional sum as just compensation which shall amount to 6% interest per annum on said $52,000.00 from the 30th day of November, 1940 to the 9th day of April, 1941, the date upon which the within suit was filed and the sum of $15,000.00 deposited in the Registry of this Court as estimated just compensation, and an additional amount as just compensation, being 6% per annum on $37,000.00, being the difference between the contract price and the amount heretofore paid into the Registry of this Court, from the 9th day of April, 1941 to

the date upon which the remaining sum shall be paid into Court.

SAMUEL M. WATSON,
Attorney for Defendant.

Photostat Copy Of The Option Attached

[fol. 49] Motion for Judgment for Plaintiff in Condemnation and for Defendant Fixing Compensation at Agreed Valuation in Option Plus Interest at Rate of 6% per annum on Agreed Valuation from date of Possession to Date of Declaration of Taking Plus Interest on sum being the difference between the Agreed Valuation and the amount deposited in Court Registry on Date of Declaration of Taking from said last mentioned date to Date of Payment.

(Filed April 3, 1945.)

Comes now the defendant Q. W. S. S. Realty and Investment Company, a corporation, by its attorney, and moves the Court to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed herein and for defendant fixing defendant's compensation herein for the taking of said real estate at $52,000.00, the amount of the agreed valuation in the option contract set forth in defendant's Amended Answer herein, and fixing defendant's compensation herein for the loss of possession of said real estate from the 30th day of November, 1940, the date upon which defendant relinquished possession to plaintiff, to the 9th day of April, 1941, the date upon which title to said real estate passed to plaintiff by virtue of the declaration of taking filed herein accompanied by payment of the sum of $15,000.00 into the Court Registry as estimated compensation, at $1153.78, being interest at the rate of 6% per annum on said agreed valuation for four months and nine days, being the period of time from the aforesaid date of November 30, 1940 to the aforesaid date of April 9, 1941, and fixing defendant's compensation herein for having withheld from it from and after April 9, 1941, the sum of $37,000.00, being the difference between the agreed valu-

ation and the amount deposited in Court on April 9, 1941, at interest at the rate of 6% per annum on said sum of $37,000.00 so withheld from it for the period of time from April 9, 1941 to the date upon which the remaining sum of $37,000.00 shall be paid into the Registry of this Court.

SAMUEL M. WATSON,
Attorney for Above Named Defendant.

[fol. 50] (List of Checks deposited in Registry of District Court to cover certain Lands in Weldon Spring Ordnance Project.)
(Filed May 17, 1945.)

In The United States District Court
Eastern District Of Missouri
Eastern Division

Weldon Spring Ordnance Project

Cases No. 767	— Deficiency —	$26,900.04	818 — Def. —		$114.00
765	— " —	7,028.20	817 — " —		8,140.00
766	— " —	22,365.00	820 — " —		19,193.00
763	— " —	5,125.00	822 — " —		6,760.00
764	— " —	22,791.00	824 — " —		4,770.00
771	— " —	6,170.00	823 — " —		13,092.00
772	— " —	660.00	854 — " —		6,100.00
777	— " —	5,855.00	877 — " —		3,725.00
778	— " —	2,935.20	865 — " —		567.00
779	— " —	3,967.83	866 — " —		7,510.00
780	— " —	2,000.00	863 — " —		932.50
781	— " —	875.00	873 — " —		7,457.20
782	— " —	5,792.00	872 — " —		6,900.00
783	— " —	5,700.00	858 — " —		3,443.00
784	— " —	4,368.00	860 — " —		8,040.00
785	— " —	34,250.00	859 — " —		16,480.00
786	— " —	2,630.18	862 — " —		2,200.00
796	— " —	19,694.00	879 — " —		1,440.00
805	— " —	21,511.25	875 — " —		5,729.00
812	— " —	6,080.00	876 — " —		7,695.00
810	— " —	110.00	856 — " —		4,300.00
813	— " —	4,428.75	868 — " —		1,380.00
814	— " —	7,283.00	869 — " —		3,697.00
797	— " —	3,825.00	960 — " —		48,500.00
806	— " —	2,940.00	978 — " —		14,132.00
808	— " —	11,140.00	985 — " —		1,240.00
811	— " —	5,435.00	988 — " —		21,374.25
834	— " —	4,878.00	984 — " —		1,500.00
841	— " —	8,670.00	999 — " —		2,140.00
833	— " —	2,150.00	1000 — " —		500.00
840	— " —	3,580.00	1001 — " —		2,590.00

832	—	"	—	760.00	1002	—	"	—	11,115.25
827	—	"	—	7,940.00	1003	—	"	—	29,297.00
843	—	"	—	4,620.00	979	—	"	—	7,120.00
836	—	"	—	1,200.00	981	—	"	—	25,000.00
829	—	"	—	312.00	980	—	"	—	16,312.50
839	—	"	—	4,860.00	989	—	"	—	3,100.00
838	—	"	—	2,440.00	986	—	"	—	2,600.00
844	—	"	—	1,493.36	987	—	"	—	18,000.00
835	—	"	—	6,960.00	992	—	"	—	933.00
826	—	"	—	3,760.00	993	—	"	—	3,617.00
852	—	"	—	17,460.00	994	—	"	—	1,100.00
853	—	"	—	850.00	995	—	"	—	16,000.00
774	—	"	—	1,563.00	997	—	"	—	20,400.00
798	—	"	—	8,260.00	991	—	"	—	1,750.00
803	—	"	—	4,100.00	1006	—	"	—	3,600.00
789	—	"	—	10,820.00	1010	—	"	—	32,804.45
792	—	"	—	9,775.74	1015	—	"	—	23,129.45
800	—	"	—	36,720.00	1014	—	"	—	450.00
790	—	"	—	8,440.00	1021	—	"	—	7,140.00
791	—	"	—	9,042.00	1019	—	"	—	12,174.00
793	—	"	—	5,100.00	1020	—	"	—	6,170.20
794	—	"	—	17,985.00	1648	—	"	—	1,670.00
804	—	"	—	14,780.00	1652	—	"	—	2,723.00
819	—	"	—	3,050.00					

$920,085.35

[fol. 51] Check No. ——————8,051,506 ————$87,595.70
——————8,051,507 ———— 48,500.00
——————8,051,508 ———— 4,393.00
——————8,051,509 ————115,932.50
——————8,051,510 ————182,604.74
——————8,051,511 ———— 85,468.10
——————8,051,512 ————229,583.57
——————8,051,513 ———— 7,028.20
——————8,051,514 ———— 83,798.54
——————8,051,515 ———— 22,365.00
——————8,051,516 ———— 26,900.00
——————8,051,517 ———— 22,791.00
——————8,051,518 ———— 3,125.00

$920,085.35

of the Treasurer of the United States, in the sum of $920,085.35, to the order of the Clerk of the United States District Court for the Eastern District of Missouri, Eastern Division, deposited by the plaintiff for the lands described in the petitions, the aforesaid sum of $920,085.35 being deposited by the plaintiff in the Registry of the Court herein as to the aforesaid lands, for the use and benefit of

the person or persons entitled thereto, the same to be applied under orders of this Court.

HARRY C. BLANTON,
United States District Attorney.

Received the above mentioned checks and deposited same in the Registry of this Court, this 17th day of May, 1945.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.

[fol. 52]

Opinion.

(Filed June 22, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff;

vs.

Certain Land in St. Charles County, Missouri, Known as The Weldon Spring Area, Defendants.

No. 782: No. 840: No. 980:
No. 784: No. 844: No. 984:
No. 80: No. 852: No. 988:
No. 820: No. 854: No. 994:
No. 822: No. 862: No. 1002:
No. 824: No. 868: No. 1020:
No. 832: No. 872: No. 1648:
No. 834: No. 878: No. 1652:
No. 838: No. 978: .....

The above cases, together with the cases pending in each of the other divisions of this court, for the purpose of avoiding repetition of the argument before each judge, were argued before the judges of the three divisions sitting en banc.

I have carefully studied the records and the briefs submitted, as well as the Memorandum Opinions written by my colleagues Judge Moore and Judge Hulen. In view of the fact that the other judges have written conflicting opinions respecting their views and have arrived at dif-

ferent conclusions, I see no necessity for filing an extended opinion on my part.

I am of the opinion that the defendants are entitled to interest on the difference between the amounts deposited in the registry of the court at the date of the filing of the Declaration of Taking and the amount specified in the option agreement until such difference is deposited in the registry of the court for the benefit of the defendants.

I am also of the opinion that the owners are not entitled to interest from the date of the taking of possession by the Government under the option agreements, until the filing of the Declarations of Taking.

I therefore concur in the conclusions reached by my colleague Judge Moore in his Memorandum Opinion filed on June 8, 1945.

Judgments may be substituted for approval, allowance and entry.

R. M. DUNCAN,
United States District Judge.

Dated this 22nd day of June, 1945.

[fol. 53] Findings and Judgment.

(Filed November 26, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 800. vs. At Law.
356.51 acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 174, and Q. W. S. S. Realty and Investment Company, a Corporation, et al., Defendants.

Now on this day, the Court having heretofore heard a motion filed by the plaintiff for judgment for plaintiff in condemnation and fixing the amount to be paid the defendants at the price agreed to by option contract referred to and set up in the answer filed by the defendants herein, without interest, and a countermotion thereto by the de-

fendant Q. W. S. S. Realty and Investment Company, a Corporation for judgment including interest, and evidence having been heard and arguments of counsel having been made, and said motions taken under advisement and the Court, being now fully informed in the premises, doth find:

That this is a proceeding in condemnation instituted by the United States of America, as plaintiff, against Q. W. S. S. Realty and Investment Company, a Corporation, to condemn the land hereinafter described, as in such cases made and provided by the laws of the United States of America, and in which there was filed a Declaration of Taking as provided for by Title 40, U. S. Code, Section 258a.

That all of the defendants have been duly served with process, as required by law, or have duly entered their ap- [fol. 54] pearances herein; and that this Court has jurisdiction of the subject matter of this cause and of all of the parties thereto.

That prior to the filing of the petition herein and prior to any proceedings in connection therewith, including the filing of a Declaration of Taking in this cause, the defendant Q. W. S. S. Realty and Investment Company, a Corporation and the plaintiff, through the War Department of the United States, entered into and executed a contract, sometimes referred to as an "option contract" which was accepted by the plaintiff in accordance with the terms thereof, whereby and as a result of which the plaintiff agreed to purchase and the said last named defendant agreed to sell to the plaintiff for the agreed valuation, being at a price in the sum of $52,000.00, the real estate or land hereinafter described.

That the said defendant Q. W. S. S. Realty and Investment Company, a Corporation was, at the time of executing said option contract and the filing of said Declaration of Taking, the owner in fee simple of the land hereinafter described.

That upon the acceptance by the plaintiff of said option contract on or about the 30th day of November, 1940, possession of the land hereinafter described was taken by

and has ever since been in the plaintiff, United States of America.

That since this proceeding was instituted and the Declaration of Taking filed herein, the Supreme Court of the United States has held binding on the parties thereto, insofar as concerns the worth or value of the land at the time of taking by the United States of America, an option contract for the sale of land, the provisions of which and the circumstances surrounding the execution of which are the same as the option contract executed by the plaintiff and the defendant Q. W. S. S. Realty and Investment Company, a Corporation except as to dates, the names of the landowners, the description of the property, and the sale price. That under the aforesaid decision of the [fol. 55] Supreme Court of the United States and the terms and provisions of the option contract executed by the plaintiff and the defendant Q. W. S. S. Realty and Investment Company, a Corporation, the sum of $52,000.00 was and is the valuation agreed upon in said Option contract as the value or worth of the land hereinafter described at the time of the taking thereof by the plaintiff, and said defendant landowners were entitled to said sum of $52,000.00 for the taking of said land, hereinafter described, as of the date of the taking of said land.

That on the 7th day of April, 1941, prior to the aforesaid decision of the Supreme Court of the United States, the plaintiff herein caused to be filed in this cause a Declaration of Taking of the land, hereinafter described, by Henry L. Stimson, Secretary of War of the United States, and, upon the filing of said Declaration of Taking, the fee simple title to the land therein described and hereinafter described became vested in the United States of America, the plaintiff herein, and the title to and possession of said land was then and has ever since been in the plaintiff, United States of America, and none of the defendants has since had any right, title or interest in said land.

That at the time of the filing of said Declaration of Taking by Henry L. Stimson, Secretary of War of the United States, there was deposited by plaintiff in the Registry of this Court the sum of $15,280.00 as the then

estimated compensation stated in said Declaration of Taking for the appropriation and taking by plaintiff of the fee simple title to the land in said Declaration described and hereinafter described; but that said deposit was erroneous and insufficient in that the same failed to equal the agreed value or worth of said land hereinafter described at the date of the taking and appropriation thereof by plaintiff.

That on the 17th day of May, 1945, there was deposited in the Registry of this Court by plaintiff an additional [fol. 56] sum of $36,720.00 as further compensation for the taking and appropriation by plaintiff of the fee simple title to the land in said Declaration of Taking described, and hereinafter described.

That the said deposits heretofore made by plaintiff into the Registry of this Court were erroneous and insufficient in that the same failed to include interest on the $36,720.00 withheld from the Registry of this Court during the period from the filing of the Declaration of Taking herein on the 7th day of April, 1941, until the 17th day of May, 1945, which interest defendant landowners were and are entitled to receive as a part of the just compensation for the taking and appropriation by plaintiff of the land hereinafter described.

That the plaintiff's petition and the proceedings in this cause set forth a cause of action for the purpose of acquiring, by proceedings in condemnation, the fee simple title to the land hereinafter described, which land was and is necessary to provide for the establishment of an Ordnance Plant for the national defense of the United States of America and for other military use incidental thereto in connection with the Weldon Spring Ordnance Plant; and that the awarding to the plaintiff of a judgment in condemnation, and the awarding to the defendant landowners of full just compensation for said land in this condemnation proceeding will perfect in the plaintiff, and divest from defendants, finally and completely, the title to the land hereinafter described, in conformity with the law of the United States of America.

That the land described in plaintiff's petition is the land described in the Declaration of Taking referred to

herein, is located in St. Charles County, State of Missouri, and is bounded, defined and described as follows:

[fol. 57] Amended Description
Case No. 800
Tract No. 174

A tract of land located partly within U. S. Surveys Nos. 476, 1670, and 3106, Twp. 45 N. R. 2 & 3 E., and more particularly described as follows:

Beginning at a point on the Eastern line of Survey No. 476, said point bearing S. 22° 22′ W. 2.75 chains from the N. E. corner of said Survey No. 476; thence N. 86° 58′ E. 6.92 chains to a point; thence N. 55° 03′ E. 7.56 chains to a point; thence S. 61° 39′ E. 15.27 chains to a point on the northwestern right-of-way line of State Highway No. 94; thence along said right-of-way line N. 35° 25′ E. 3.04 chains to point of curvature; thence northeastwardly along a curve of said Highway, having a radius of 7.146 chains, thru a central angle of 36° 20′ to the right, a distance of 4.53 chains to point of tangent of said right-of-way curve; thence N. 71° 45′ E. 7.40 chains to a point on said right-of-way line; thence S. 67° 12′ E. 7.67 chains to a point; thence N. 56° 17′ E. 4.92 chains to a point; thence S. 55° 27′ E. 3.00 chains to a point in the center line of the Missouri, Kansas and Texas right-of-way; thence N. 58° 15′ E. along said center line 28.16 chains to a point; thence S. 66° 36′ E. 8.97 chains to a point on the left bank of the Missouri River; thence along the left bank of said river and the property now or formerly of Mitchell Castlio the following courses and distances: S. 37° 05′ W. 6.50 chains S. 18° W. 7.10 chains and S. 24° 30′ W. 5.41 chains to the property of said Castlio; thence along said property line the following courses and distances: N. 43° W. 4.22 chains to a point; thence N. 68° 38′ W. 2.51 chains to a point; thence N. 89° 49′ W. 3.90 chains to a point; thence S. 72° 29′ W. 2.88 chains to a point; thence S. 66° 12′ W. 7.79 chains to a point; thence S. 62° W. 5.02 chains to a point; thence S. 78° 30′ W. 7.63 chains to a point; thence west 5.54 chains to a point on the southeast right-of-way line of said Missouri, Kansas and Texas Railroad; thence S. 57° 30′ W. along said right-of-way line 3.56 chains to a point; thence S. 17° 30′ W. 7.82 chains to a point; thence S. 23°

30′ E. 8.56 chains to a point in the center line of Femme Osage Creek; thence along the center line of said creek the following courses and distances: N. 75° E. 2.18 chains; N. 64° E. 6.81 chains; N. 60° 45′ E. 3.84 chains; N. 59° 30′ E. 10.30 chains; N. 71° E. 2.18 chains; N. 88° E. 3.70 chains; East 2.31 chains and N. 75° E. 6.10 chains to a point at the intersection of said center line of said creek with the left bank of the Missouri River; thence along the left bank of said river S. 33° 30′ W. 26.90 chains to a point; thence N. 68° W. along the prolongation of the northern line of U. S. Survey No. 1670, 1.08 chains to an iron bar at the northeast corner of said Survey No. 1670; thence S. 22° W. 15.98 chains to a point; thence N. 68° W. 39.25 chains to a point; thence S. 22° W. 14.27 chains to a point; thence N. 68° W. 17.24 chains to a point; thence S. 22° W. 28.72 chains to a point; thence S. 68° E. 1.39 chains to a point; thence S. 22° W. 11.11 chains to a point in the southern line of Survey No. 1670, which line is also the northern line of U. S. Survey No. 44; thence N. 68° W. along said survey line 9.10 chains; thence N. 22° 22′ E. along the western line of Survey No. 1670 and the Eastern line of Survey No. 476, 14.50 chains to a point on the right bank of the Femme Osage Creek; thence along the right bank of said creek the following courses and distances: N. 54° 16′ W. 1.74 chains; N. 34° 44′ W. 5.50 chains; N. 51° 31′ W. 1.55 chains; N. 36° 13′ W. 1.60 chains; N. 8° 51′ W. 1.15 chains; N. 13° 28′ E. 2.42 chains; N. 45° 45′ E. 1.61 [fol. 58] chains; N. 61° 52′ E. 2.63 chains; N. 54° 56′ E. 4.67 chains; N. 62° 15′ E. 1.88 chains; N. 54° 01′ E. 2.81 chains; N. 47° 44′ E. 1.50 chains; N. 41° 49′ E. 2.33 chains; N. 36° 42′ E. 3.73 chains and N. 47° 56′ E. 0.66 chains to a point in the western line of said Survey No. 1670; thence N. 22° 22′ E. along said survey line, 35.69 chains to the point of beginning, said tract containing 311 acres, more or less, exclusive of State Highway No. 94 and the Missouri, Kansas and Texas Railroad right-of-way, and subject to all existing highways and public utility easements.

Also a 12-foot (or 0.182 chain) strip, being part of U. S. Survey No. 1670, Twp. 45 N. R. 2 E., and more particularly described as follows: Beginning at a point in the center line of a county road, which point is also the Northeast corner of U. S. Survey No. 44; thence N. 68° W. along

the north line of said Survey No. 44 and south line of U. S. Survey No. 1670, 15.85 chains to a point; thence N. 22° E. 0.182 chains to a point; thence S. 68° E. 15.85 chains to a point in the center line of said county road; thence S. 22° W. along said center line 0.182 chains to the place of beginning, containing .288 of an acre, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 59] That the plaintiff's said motion for judgment should be sustained in part, but should be denied insofar as the same seeks to prevent defendant landowners from receiving any interest as a part of the full just compensation to be allowed to them for said land.

That the defendant landowners' said motion for judgment should be sustained in part, and denied only insofar as the same prays interest on the said sum of $36,720.00 from the date of the taking of physical possession of said land on or about the 30th day of November, 1940, to the filing of the Declaration of Taking herein on the 7th day of April, 1941.

Now, therefore, in accordance with the above findings of fact, it is Ordered, Adjudged And Decreed that:

(1) Plaintiff, United States of America, by virtue of this proceeding, is awarded judgment in condemnation against the premises described in plaintiff's petition and hereinabove described, for the purposes herein defined and specified, and against the defendants herein, and each and all of them, jointly and severally, as their title and rights may appear, and that the title in fee simple, subject to all existing highway and public utility easements, but including the fee underlying such existing easements, is vested in the plaintiff, United States of America, and has been vested in the plaintiff, United States of America, upon and since the filing of the Declaration of Taking, and the defendants, and each and all of them, jointly and severally, are divested of any and all right, title, interest and claim, of every nature and description, in the land above described.

(2) That the defendant landowners are entitled to and there is awarded to them the sum of $72,000.00 as and for the agreed value or worth of said land, established by

the aforesaid option contract, as of the date of the filing of the Declaration of Taking herein, together with interest [fol. 60] on $36,720.00 of said sum at the rate of six per cent (6%) per annum from the 7th day of April, 1941, until the 17th day of May, 1945, which said sum of $36,720.00 and said interest constitute the full just compensation to which defendant landowners and any and all other persons who may be found entitled thereto as claiming by, through or under them are entitled in this cause for said land.

(3) That the Plaintiff shall pay into the Registry of this Court forthwith a sum, being the equivalent of six per cent (6%) interest on said sum of $36,720.00 from the 7th day of April, 1941 to the 17th day of May, 1945, as that part of the just compensation to which defendants are entitled for the taking by plaintiff of said land herein described which has not been heretofore deposited in the Registry of this Court by plaintiff, which amount, together with the amounts heretofore deposited in the Registry of this Court, and not heretofore disbursed by order of this Court, shall repose in the Registry of this Court for the use and benefit of the defendant landowners and other defendants claiming an interest therein by and through the defendant landowners, and for disposition in the way, manner and proportion, as this Court shall hereafter order, adjudge and decree.

(4) That this cause shall be held open for entry of such further and other orders and decrees as may be meet and just in the premises.

Dated this 26th day of November, 1945.

(S) R. M. DUNCAN,
United States District Judge.

[fol. 61] (Motion of Plaintiff for New Trial.)

(Filed November 27, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial for the following reasons:

1. The Court erred in holding that this is an adversary condemnation proceeding;

2. The Court erred in not holding that this is a friendly condemnation proceeding according to the terms and provisions of the option-contract;

3. The Court erred in not holding that the filing of the equitable answer by the property owners converted this condemnation proceeding into an equitable action for the enforcement of the option-contract;

4. The Court erred in holding that this condemnation proceeding differs in no respect from any other condemnation proceeding except in the method of ascertaining the value of the land;

5. The Court erred in not holding that the equitable answer filed by the property owners in this case and the decision of the Supreme Court of the United States upholding the validity of the option-contract and the allegations of the equitable answer took the case out of the operation of the Declaration of Taking part of this condemnation proceeding;

[fol. 62] 6. The Court erred in holding that there was an ascertainment of the value of the land in this proceeding, for it has never been ascertained by this Court nor by any Appellate Court;

7. The Court erred in not holding that the compensation was not ascertained in this proceeding but that on the contrary it was fixed by the option-contract and the opinion of the Supreme Court of the United States holding such option-contract to be valid and binding upon the plaintiff;

8. The Court erred in its construction of the option-contract;

9. The Court erred in holding that the amount mentioned in the option-contract was the fair market value of the land involved in this case at the time of the filing of the Declaration of Taking in this case;

10. The Court erred in not holding that the sum mentioned in the option-contract is the full compensation to which the property owners are entitled in this proceeding;

11. The Court erred in its definition as to what constitutes just compensation;

12. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty to be paid by the plaintiff for its failure to perform the conditions of the option-contract immediately after its acceptance by the Government;

13. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty against the Government for litigating the validity of the option-contract;

14. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty for the Government's delay in the payment of the amount mentioned in the option-contract when such delay was caused by the vigilance and diligence of plaintiff's Officers and Attorneys in litigating the validity of the option-contract, and with the acquiescence of the defendant property owners;

[fol. 63] 15. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty without citing some statute authorizing such penalty;

16. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to promptly perform and fulfill the provisions and conditions of the option-contract;

17. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to fully and completely perform and fulfill the provisions and conditions of the option-contract;

18. The Court erred in its construction of the opinion of the Supreme Court of the United States in the Andrews and Muschany cases;

19. The Court erred in not holding that the Supreme Court of the United States held that the amount mentioned

in the option-contract was full and complete compensation when the Supreme Court said:

"The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this offer, agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses . . . The Government knew the total cost when it became bound on the contract." (emphasis added)

20. The Court erred in holding that the burden of proof is upon the Government to show the absence of any contract obligation to pay interest or any statute providing for interest;

21. The Court erred in not holding that the burden of proof is upon the property owners to point out the exact provision of the contract providing for interest or to point out the exact provision of the statute providing for interest and a full compliance by the property owners with such statute;

[fol. 64] 22. The Court erred in allowing interest upon any part of the amount mentioned in the option-contract and for any period of time;

23. The decision of the judgment now entered is contrary to the views of the Court when the question of the option was first presented to the Court in the Muschany and Andrews cases when the District Courts held in the Findings of Fact and Conclusions of Law that the property owners were entitled to recover only the principal amount named in the option without interest;

24. That as the Supreme Court, the Court of Appeals and the District Court all held in passing on the McDowell option that the amount included therein included not only the value of the land but compensation to the title company, compensation to McDowell by way of commission, and other expenses; to now allow interest on the entire sum to the property owner would be to allow him interest on not only the value of his land but also on other items which do not belong to him, but which, in truth and in fact, are being paid by the Government and not by the property owners so the title company and to McDowell;

25. That by including all of these elements in the amount named in the option, as well as the value of the land, the parties conclusively show that they were considering the amount of the option to be the total and entire amount to be paid by the Government as full compensation for the land and the other elements named therein, and further show that it was the intention of the parties that that amount and no additions thereto by way of interest was to be paid by the Government;

26. That the Court erred in holding that the amount named in the option represented the value of the land in view of the holding of the Supreme Court that it did not represent that amount at all, but that it represented the agreed purchase price, and in view of the fact that the option contract itself repeatedly refers to it as the agreed [fol. 65] purchase price and not value;

27. That the position of the land owners in asking for interest under the Declaration of Taking Statute is inconsistent with their prior position heretofore asserted that they were entitled to have the option contract enforced as an option contract and that said contract not calling for interest, having failed to provide for the payment of interest, does not now entitle the landowners to interest in addition to the principal amount named therein;

28. The Court erred in finding that, upon the acceptance by the plaintiff of the said option-contract the possession of the land involved herein was taken by, and has ever since been in the plaintiff, the United States of America, because there was no evidence to sustain the said finding of fact;

29. The Court erred in not holding that the right to immediate possession of the land was included in the consideration mentioned in the option-contract and that such right of immediate posession was contracted for in the said option-contract and that the payment of the consideration mentioned in the option-contract is full payment for the land herein involved and for the right to immediate possession thereof obtained by the plaintiff under such option-contract;

30. The Court erred in holding that there was a taking under the Declaration of Taking filed in this cause such as

contemplated by the Declaration of Taking Statute because the right to possession of the property had theretofore been contracted for under the terms and provisions of the option-contract;

31. The Court erred in holding that the property owners are entitled to interest under the provisions of the Declaration of Taking Statute because there was no taking under the Declaration of Taking which could authorize the allowance of interest under such statute;

[fol. 66] 32. The Court erred in holding that there was an ascertainment of just compensation in this proceeding, such as is mentioned and contemplated in the Declaration of Taking Statute, in order to warrant the inclusion, as part of the just compensation awarded, of interest at the rate of 6% per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment, or upon such part of the amount finally awarded as was not deposited contemporaneously with the Declaration of Taking;

33. The Court erred in holding that the two deposits made in this case, the first with the Declaration of Taking and the second on May 17, 1945 were erroneous and insufficient in that they failed to include any interest;

34. The Court erred in its judgment and decree entered in this cause by adding interest at the rate of 6% per annum upon the deficiency or upon the difference between the amount deposited with the Declaration of Taking and the amount mentioned in the option-contract;

35. The Court erred in its judgment and decree entered in this cause by including interest at the rate of 6% per annum from the date of the Declaration of Taking in this cause to May 17, 1945 upon the amount deposited in the Registry of this Court on the said 17th day of May, 1945;

36. The Court erred in its judgment and decree entered in this cause by requiring the plaintiff to pay into the Registry of the Court forthwith a sum of money equivalent to 6% interest on the sum deposited in the

Registry of this Court on May 17, 1945, from the date of the Declaration of Taking in this case to the date of said deposit on May 17, 1945 as a part of the just compensation to which the defendants are entitled for the taking of the lands involved in this cause;

[fol. 67] 37. The Court erred in its findings and in its judgment and decree in the computation of the amount of the interest adjudged to the defendants upon the deficiency from the date of the Declaration of Taking to May 17, 1945;

38. The Findings and Judgment entered in this cause are contrary to and against the evidence under the law, are contrary to and against the law under the evidence and are contrary to and against the law and the evidence;

Wherefore, Plaintiff moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial herein.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 27th day of November, 1945.

[fol. 67a] (Docket Entry of Submission and Overruling of Motion of Plaintiff for New Trial.)

November 21, 1945

Motion of plaintiff for a new trial submitted by plaintiff, taken as submitted by defendants and overruled.

[fol. 68] Statement of Points to be Relied Upon on Appeal.

(Filed December 7, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 800. vs. At Law.
356.51 Acres of Land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 174, and Q. W. S. S. Realty and Investment Company, a Corporation, et al., Defendants.

The United States of America, appellant in the above-entitled case, states that the following points will be relied upon on the appeal:

1. The District Court erred in denying the plaintiff's motion for judgment fixing compensation in the amount of the option contract price, without interest.

2. The District Court erred in entering judgment with interest on $36,720.00, the difference between $52,000.00 the amount of the option contract price, and $15,280.00, the sum deposited with the Declaration of Taking, from April 7, 1941, the date of the filing of the Declaration of Taking, to May 17, 1945, the date of the deposit in court of such difference.

3. The District Court erred in overruling plaintiff's motion for a new trial.

Respectfully submitted,

HARRY C. BLANTON.

Copy of the foregoing Statement mailed to opposing counsel, Mr. Samuel M. Watson. 254 Olive St., St. Louis, Missouri, this 7th day of Decem..., 1945.

HARRY C. BLANTON.

[fol. 69] Designation of the Record on Appeal.

(Filed December 7, 1945.)

United States of America, Appellant in the above entitled cause, designates for inclusion in the Transcript of the Record on Appeal the pleadings, proceedings and evidence as follows:

	Filed
(1) Petition in condemnation as amended July 24, 1941 and as further amended April 8, 1942, March 4, 1945 and December 12, 1942.	April 9, 1941
(2) Declaration of Taking in Cause No. 770, omitting therefrom all names from the caption excepting the defendant Q. W. S. S. Realty and Investment Company, a Corporation, and, omitting from the paragraph describing the parcels of land in the said Declaration all parcels except Tract No. 174	April 7, 1941
(3) Order and Judgment vesting title in Plaintiff as to Tract No. 174 and Order of Immediate Possession	April 9, 1941
(4) Order directing the transfer of the sum of $15,280.00 from Cause No. 770 to this cause for the use and benefit of the defendants in this cause	April 9, 1941
(5) Answer of the defendant, Q. W. S. S. Realty and Investment Company, a Corporation to Plaintiff's petition in condemnation	May 19, 1941
(6) Motion of Plaintiff for Judgment in condemnation and for Judgment for defendants fixing compensation by the option-contract	March 20, 1945
[fol. 70] (7) Order setting for hearing on April 4, 1945 Plaintiff's Mo-	

	tion for Judgment in condemnation	March 20, 1945
(8)	Amended answer of defendant, Q. W. S. S. Realty and Investment Company, a Corporation, to Plaintiff's petition	April 2, 1945
(9)	Motion of defendant, Q. W. S. S. Realty and Investment Company, a Corporation, for Judgment in condemnation for plaintiff and for Judgment for defendant, fixing compensation by option, together with interest	April 3, 1945
(10)	Receipt of the Clerk for 36,720.00 paid into the Registry of the Court	May 17, 1945
(11)	Memorandum Opinion of the Court finding the issues in favor of the defendants and against the Plaintiff	June 22, 1945
(12)	Findings and Judgment	Nov. 26, 1945
(13)	Plaintiff's Motion for New Trial	Nov. 27, 1945
(14)	Docket entry of November 27, 1945, overruling Plaintiff's Motion for New Trial	
(15)	Plaintiff's Notice of Appeal	Nov. 28, 1945
(16)	Appellant's Statement of Points	
(17)	Clerk's Docket entries	
(18)	This Designation of the Record	
(19)	All other pleadings and documents filed in connection with this appeal.	

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

W. WALKER COOPER,
Special Assistant United States Attorney.

Copy of the foregoing designation of record mailed to opposing counsel this 7th day of December, 1945.

HARRY C. BLANTON.

[fol. 71] Clerk's Certificate:

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the above and foregoing to be a full, true and complete transcript (except in so far as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in case No. 800 wherein the United States of America is plaintiff-appellant and 356.51 [Acref] of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 174, and Q. W. S. S. Realty and Investment Company, a corporation, et al., are defendants-appellees, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, State of Missouri, in said Division of said District this 21st day of December, in the year of our Lord, Nineteen Hundred and Forty-five.

Seal of
U. S. Dist. Court
East. Div. of the
East. Judicial Dist.
of Mo.

JAMES J. O'CONNOR,
Clerk, U. S. District Court,
By John J. Jarvis,
Deputy Clerk.

Filed Dec. 21, 1945. E. E. Koch, Clerk.

[fol. 1] Notice of Appeal.

(Filed November 23, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 987. vs. At Law.
160 Acres of land, more or less, situate in St. Charles County, State of Missouri; Known as Tract No. 11-A, and Edward J. Linnenbringer, et al., Defendants.

Notice is hereby given that the United States of America, Plaintiff in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final Judgment entered in this cause on the 2nd day of July, 1945.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 23rd day of November, 1945.

[fol. 2] Docket entry showing filing of notice of appeal and mailing copy of such notice to attorney for defendant.

(November 23, 1945)

Notice of Appeal of plaintiff to the United States Circuit Court of Appeals, 8th Circuit from final judgment entered herein July 2, 1945, filed by U. S. Attorney and copy of aforesaid notice forthwith mailed by the Clerk of the Court to Wiliam R. Gilbert, Esq., atty. of record for defts. Edward J. Linnenbringer, et al.

[fol. 3] (Clerk's Docket Entries of Case No. 987.)

United States Of America, Plaintiff,
Docket No. 987. vs. At Law.
160 Acres of land, more or less situate in St. Charles County, State of Missouri, known as Tract No. 11-A, and Edward J. Linnenbringer, et al., Defendants.

6-18-41 Motion of plaintiff for leave to file petition in condemnation and for order for summons filed, and granted in order filed and entered; petition in condemnation filed and summons issued, directed to defendants, returnable August 4, 1941; order and judgment on Declaration of Taking filed and entered vesting fee simple title in plaintiff and directing immediate delivery to plaintiff of land in suit; order filed and entered directing notice to be given defendants of judgment on Declaration of Taking and requirement for delivery of possession; clerk of the Court directed to transfer the sum of $16,000.00 from Cause No. 979 to this cause for use and benefit of parties entitled thereto.

7-23-41 Answer of defendants Edward J. and Emma Linnenbringer to plaintiff's petition, filed.

7-29-41 Answer of defendant Elroy H. Linnenbringer to plaintiff's petition filed by leave.

7-29-41 Order filed and entered continuing cause to September 15, 1941.

8- 4-41 Order filed and entered continuing cause to September 15, 1941.

8- 4-41 Marshal's Return as to service to summons filed (Executed).

9-15-41 On motion of U. S. Attorney, order filed and entered continuing cause to October 14, 1941. Division No. 1.

10- 9-41 On motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition relative to land description.

10-14-41 On oral motion of U. S. Attorney, order filed and entered continuing case to January 7, 1942.

11-29-41 Claim of Collector of Revenue of St. Charles County, Missouri, for payment of taxes, filed.

12-17-41 On stipulation between plaintiff and defendants Edward J. Linnenbringer et al., for provisional disbursement of estimated compensation filed and presented, order for distribution of $14,400, out of funds on deposit in Registry of this cause filed and entered.

1- 7-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to March 9, 1942.

[fol. 4] 3- 9-42 On oral motion of U. S. Attorney, Order filed and entered continuing cause to June 9, 1942.

6- 1-42 Upon motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition in certain respects as to unknown owners, etc.

6- 9-42 Upon oral motion of U. S. Attorney, order filed and entered continuing cause to September 9, 1942.

9- 9-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to December 9, 1942.

12- 7-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to January 14, 1943.

1-14-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to April 14, 1943.

4-14-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to October 14, 1943.

7-29-43 On motion of plaintiff filed and presented, order filed and entered directing clerk of the Court to disburse to County officials of St. Charles County, Missouri, for the benefit of Darst Bottom Drainage and Protective District No. 2, certain drainage tax money.

10-14-43 On oral motion of U. S. Attorney, order filed and entered in above case continuing cause to February 14, 1944.

2-14-44 On oral motion of U. S. Attorney, order filed continuing cause to May 15, 1944.

5-15-44 On oral motion of U. S. Attorney, order filed continuing cause to November 4, 1944.

11- 4-44 On oral motion of U. S. Attorney, order filed continuing cause to February 5, 1945.

2- 5-45 On oral motion of U. S. Attorney, order filed continuing cause to May 3, 1945.

4- 6-45 Motion of plaintiff for judgment in condemnation and for judgment for defendants fixing compensation by option filed and order thereon filed and entered setting said motion for hearing on May 7, 1945; vacating order heretofore entered continuing cause to May 3, 1945, and directing plaintiff give notice of such hearing by mail to defendants, their attorneys, and R. Newton McDowell and The Kansas City Title Insurance Company, and by posting notice thereof, etc.

4- 6-45 Claim of plaintiff in its own behalf and for Collector of Internal Revenue for Sixth Collection District of Missouri, asserted by reason of certain lien, interest and penalties thereon against any disbursement herein from Registry awarded to R. Newton McDowell, filed.

[fol. 5] 4-10-45 Affidavit as to mailing of notice to defendants, their attorneys and other parties in interest of hearing on motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option filed by plaintiff.

4-21-45 Clerk's Return to posted notice filed.

4-26-45 Answer of defendant to plaintiff's motion for judgment in condemnation and fixing compensation by option and motion of defendants for judgment as prayed herein, filed.

5- 5-45 Claim of intervening defendant Kansas City Title Insurance Company, filed.

5- 7-45 Motion of plaintiff for judgment for plaintiff in condemnation and for defendant fixing compensation by option and on responsive pleadings thereto and counter-motions of defendants for payment of interest submitted. Defendants desiring to submit briefs granted 10 days and Government ten days thereafter to submit answering brief.

5-17-45 Plaintiff tenders into Court for the use and benefit of persons entitled thereto deficiency in the sum of $18,000.00, which sum is deposited by the Clerk in the Registry.

6- 8-45 Memorandum opinion of the Court filed finding issues in favor of defendants and against plaintiff directing appropriate judgment be submitted respecting the payment of interest, and directing counsel to submit orders ruling on various motions and counter-motions, all in accordance with said opinion, for approval, signature and entry, excepting Cases No. 807 and 874, known as Muschany and Andrews Cases.

6- 8-45 Supplemental claim of U. S. of A. filed.

7- 2-45 Joint Findings and Judgment filed and entered. Judgment in condemnation awarded plaintiff as prayed. Just compensation of defendant landowners in accordance with the option contract fixed at the sum of $34,000.00 plus interest on $18,000.00 of said sum at the rate of 6% per annum from the 18th day of June 1941 to the 17th day of May, 1945. Plaintiff directed to forthwith pay into the Registry of the Court the sum of $4,230.00 being interest at the rate of 6% per annum on the sum of $18,000.00 etc., as that part of just compensation which the owners of the land are entitled to, etc., and which has not heretofore been deposited in the Registry of the Court, which sum of $4,230.00 together with the sum of $34,000.00 heretofore deposited by plain-

tiff shall repose in the Registry of the Court for the benefit of use of the owners of said land entitled thereto and for disposition in the manner and proportion as this Court shall hereafter order, adjudge and decree.

[fol. 6] 7- 7-45 Motion of plaintiff for new trial, filed.

8-10-45 Amended claim of the United States of America, filed.

8-10-45 Claim of R. Newton McDowell, together with stipulation of the respective parties assigning to said McDowell 5% of the funds deposited in the Registry of this Court, etc., filed.

8-24-45 Motion of Reconstruction Finance Corporation to intervene, together with proposed intervening petition, filed.

8-29-45 Order of Hon. Geo. H. Moore, received, filed and entered, fixing September 18, 1945 as time for defendants to file intervening petitions herein and setting such intervening petitions for hearing on September 21, 1945.

9- 7-45 Affidavit as to mailing of notice to defendants to file intervening petitions for distribution of sum on deposit in Registry and of date set for hearing same, filed by plaintiff.

9-17-45 Intervening petition of Blatchford Downing as Assignee-Pledgee of R. Newton McDowell, filed.

9-17-45 On oral motion of U. S. Attorney, order filed continuing cause from September 21, 1945 to September 28, 1945.

9-17-45 Motion to intervene and proposed intervening petition thereto attached of National Refining Company, together with affidavit as to service of aforesaid motion and proposed intervening petition by movant upon parties in interest, filed.

9-18-45 Clerk's Return to posted notice, filed.

9-28-45 By leave, Kansas City Title Insurance Company dismisses its claim herein. Claim of R. Newton McDowell submitted and allowed and sum in-

volved in such allowed-claim ordered held in the Registry of the Court until further order. Cause submitted for distribution. Separate motions of Reconstruction Finance Corporation, et al., for leave to intervene submitted on briefs to be hereafter presented; movants granted one week to submit brief, Government ten days thereafter to submit answering brief and movant Reconstruction Finance Corporation one week thereafter to submit reply brief.

10- 3-45 Order of partial distribution filed and entered.

11-21-45 Motion of plaintiff for a new trial submitted by plaintiff taken as submitted by defendants and overruled.

November 23—Notice of appeal of plaintiff to the United States Circuit Court of Appeals, 8th Circuit from final judgment entered herein July 2, 1945, filed by United States Attorney and copy of aforesaid notice forthwith mailed by the Clerk of the Court to William R. Gilbert, Esq., atty of record for defendants, Edward J. Linnenbringer, et al.

December 7—Appellant's designation of record and (2) statement of points to be relied upon on appeal, filed.

[fol. 7] Petition in Condemnation.

(Filed June 18, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 987. vs. At Law.
Tract No. 11-A.

160 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known as Tract No. 11-A, and

Edward J. Linnenbringer, Emma Linnenbringer, wife of Edward J. Linnenbringer, Elroy H. Linnenbringer,

tenant, Darst Bottoms Drainage and Protective District No. 2, a public corporation, Collector Of Revenue Of St. Charles County, Missouri, County Of St. Charles, State Of Missouri,

All Other Unknown Owners of all that tract of land situate in St. Charles County, State of Missouri, Known as Tract No. 11-A, and more particularly described herein, Defendants.

[fol. 8] To The Honorable, The Judges Of The United States District Court For The Eastern District Of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and A. G. Edwards, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Secretary of War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized and empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in fee simple absolute of the land hereinafter described and the

title thereto, which real estate is located as aforesaid, and [fol. 9] is authorized and directed to be brought by the Secretary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257); and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940, (Public No. 667—76th Congress); and the Act of Congress approved September 24, 1940, (Publ. Ros. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United States and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

[fol. 10] Order 10-9-41

Amended description

Case No. 987, Tract No. 11-A.

Tract No. 11-A, containing 160 acres of land, more or less, situate in St. Charles County, Missouri, and more particularly described as follows:

Part of Survey 476, Township 45 North, Range 2 East, described as follows: Beginning at a point on the east line of said Survey being the intersection of said East line with the middle line of the public road leading through said Sur-

vey, a rock; thence with said east line, South 22 degrees West 10 chains, and 25 links to the middle line of Femme Osage Creek; thence following the meanders of the middle line of said creek up the same to its intersection with the boundary line of the first tract described in deed from Barbara A. Tyler to Joseph G. Tyler, of date Nov. 7, 1888; thence North to corner a rock on west bank of Spring Branch at its confluence with said creek; thence North 26½ degrees West 34 chains and 22 links to corner, a rock in center of said public road; thence following the meanders of said road as follows: North 58½ degrees East 8 chains; thence North 32 degrees East 5 chains 50 links; thence North 63 degrees East 3 chains 50 links to West Bank of Little Femme Osage Creek; thence North 28 degrees East 85 links to Elm tree 15 inches in diameter on opposite side of said creek; thence same course (North 28 degrees East) 4 chains 15 links; thence North 73 degrees East 3 chains; thence South 65¾ degrees East 9 chains; thence North 74¾ degrees East 6 chains 50 links; thence South 37½ degrees East 3 chains; thence South 59 degrees East 9 chains; thence South 80 degrees East 5 chains; thence North 77 degrees East 3 chains; thence North 63½ degrees East 6 chains 14 links; to corner a rock in said Road, the place of beginning, this land being situated in St. Charles County, Missouri, and containing 160 acres, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 11] (A)

Tract No. 11 A containing 160 acres of land, more or less, situate in St. Charles County, Missouri, and more particularly described as follows:

Part of Survey No. 476, Township 45 North, Range 2 East, described as follows: Beginning at a point on the east line of said Survey being the intersection of said east line with the middle line of the public road leading through said Survey, a rock; thence with said east line, South 22 degrees West 10 chains, and 25 links to the middle line of Femme Osage Creek; thence following the meanders of the middle line of said creek up the same to its intersection with the boundary line of the first tract.

described in deed from the grantor herein to Joseph G. Tyler, of even date herewith; thence North to corner a rock on west bank of Spring Branch at its confluence with said creek; thence North 26½ degrees West 34 chains and 22 links to corner, a rock in center of said public road; thence following the meanders of said road as follows: North 58½ degrees East 8 chains; thence North 32 degrees East 5 chains 50 links; thence North 63 degrees East 3 chains 50 links to West Bank of Little Femme Osage Creek; thence North 28 degrees East 85 links to Elm tree 15 inches in diameter on opposite side of said creek; thence same course (North 28 degrees East) 4 chains 15 links; thence North 73 degrees East 9 chains; thence South 65¾ degrees East 9 chains; thence North 74¾ degrees East 6 chains 50 links; thence North 37½ degrees East 3 chains; thence South 59 degrees East 9 chains; thence South 80 degrees East 5 chains; thence North 77 degrees East 3 chains; thence North 63½ degrees East 6 chains 14 links; to corner a rock in said Road, the place of beginning, this land being situated in St. Charles County, Missouri, and containing 160 acres, more or less.

Subject to all existing highway and public utility easements but including the fee underlying such existing easements.

[fol. 12] (B)

That the following defendants own or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

Edward J. Linnenbringer

Emma Linnenbringer, wife of Edward J. Linnenbringer

Elroy H. Linnenbringer, tenant

Darst Bottoms Drainage and Protective District No. 2, a public corporation.

[fol. 13] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Col-

lector of Revenue of St. Charles County, Missouri, are, therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands; each claim and assert, or may claim and assert a reversionary interest in and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lieners and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and claimants to eastments in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendant, as hereinabove specifically named, if known, and if unknown, such unknown persons by the description of the "Unknown Owners' of the land herein described and to be condemned, to the end that they may come into court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

Eleventh: That your petitioner has attempted to set forth the interest or estates of all persons, firms and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporation having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that all of their rights, title, interests and estate, whatever it [fol. 14] may be, to all and singular, the premises above

mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident defendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts appropos to this proceeding and the provisions of the law applicable thereto, under which this action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants; that the Court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that these defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court, upon the filing of this petition, will make an order pursuant to the Act of

[fol. 15] Congress approved February 26, 1931. (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servants, agents and employees, may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interests therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief in the premises to which this petitioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney for the
Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri.

A. G. EDWARDS,
Special Assistant to the
United States Attorney,
410 New Federal Building,
St. Louis, Missouri.

[fol. 16] United States of America,
Eastern District of Missouri—ss.:

Before me, the undersigned, personally appeared Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information

and belief; and that this proceeding is in good faith for the purposes specified in the petition.

HARRY C. BLANTON.

Subscribed and sworn to before me, this 18th day of June, 1941.

JAMES J. O'CONNOR,
Clerk of U. S. District Court in and for the Eastern District of Missouri.
By Ruby Barham, Deputy.

(Seal)

[fol. 17] Declaration of Taking.

(Filed June 16, 1941.)

In The United States District Court In And For The Eastern District Of Missouri.

United States Of America, Petitioner,
Case No. 979. vs.
1,453.50 Acres Of Land, More Or Less, Situate in St. Charles County, State Of Missouri, And Mary Schneider, Et Al., Defendants.

To The Honorable, The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U.S.C. sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act of Congress approved April 5, 1941 (Public Law 29—77th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for

other uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

[fol. 18] 2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject, however, to existing rights for easements for public utilities.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 13th day of June, A. D. 1941, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

[fol. 19] Schedule "A"

The land which is the subject matter of this Declaration of Taking and of this condemnation aggregates 1,453.50 acres, more or less, situate and being in the County of St. Charles, State of Missouri. A description of the lands ta-

ken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

[fol. 20] Tract No. 11-A.

Description:

Part of Survey No. 476, Township 45 North, Range 2 East, described as follows: Beginning at a point on the east line of said Survey being the intersection of said east line with the middle line of the public road leading through said Survey, a rock; thence with said east line, South 22 degrees West 10 chains, and 25 links to the middle line of Femme Osage Creek; thence following the meanders of the middle line of said creek up the same to its intersection with the boundary line of the first tract described in deed from the grantor herein to Joseph G. Tyler, of even date herewith; thence North to corner a rock on west bank of Spring Branch at its confluence with said creek; thence North 26½ degrees West 34 chains and 22 links to corner, a rock in center of said public road; thence following the meanders of said road as follows: North 58½ degrees East 8 chains; thence North 32 degrees East 5 chains 50 links; thence North 63 degrees East 3 chains 50 links to West Bank of Little Femme Osage Creek; thence North 28 degrees East 85 links to Elm tree 15 inches in diameter on opposite side of said creek; thence same course (North 28 degrees East) 4 chains 15 links; thence North 73 degrees East 9 chains; thence South 65¾ degrees East 9 chains; thence North 74¾ degrees East 6 chains 50 links; thence North 37½ degrees East 3 chains; thence South 59 degrees East 9 chains; thence South 80 degrees East 5 chains; thence North 77 degrees East 3 chains; thence North 63½ degrees East 6 chains 14 links; to corner a rock in said Road, the place of beginning, this land being situated in St. Charles County, Missouri, and containing 160 acres, more or less.

Names of purported owners: Ed. J. Linnenbringer and Emma Linnenbringer

Estimated Compensation: $16,000.00

[fol. 21] Order And Judgment On Declaration Of Taking.

(Filed June 18, 1941.)

In The United States District Court Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 987. vs. At Law.
Tract No. 11-A.
160 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known as Tract No. 11-A, and Edward J. Linnenbringer, et al., Defendants.

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter a judgment herein on the Declaration of Taking filed in Case No. 979 on June 16, 1941, and upon consideration of said motion, and the condemnation petition filed herein, and the Declaration of Taking filed in said Cause No. 979, the Court, having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land described in said petition, and also under authority of the Attorney General of the United States.

Second: That said Petition filed herein and the Declaration of Taking heretofore filed in Cause No. 979 state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United States of America, for the purposes therein set forth;

[fol. 22] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in the said Declaration of Taking;

Fourth: That the said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use:

Fifth: That a map or plan showing the land taken is annexed to and made a part of the said Declaration of Taking;

Sixth: That a statement is contained in the said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 11-A, in the amount of Sixteen Thousand Dollars ($16,000.00), and that said sum was deposited in the Registry of this Court in Case No. 979 to the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking:

Seventh: That a statement is contained in the said Declaration of Taking that the amount of the ultimate award of compensation for Tract No. 11-A, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor,

It Is Therefore Ordered And Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of the said Declaration of Taking and depositing in the Registry of this Court of the aforesaid estimated compensation, which land is situated in St. Charles County, Missouri, and described as follows:

[fol. 23] Tract No. 11-A containing 160 acres of land, more or less, situate in St. Charles County, Missouri, and more particularly described as follows:

Part of Survey No. 476, Township 45 North, Range 2 East, described as follows: Beginning at a point on the east line of said Survey being the intersection of said east line with the middle line of the public road leading through said Survey, a rock; thence with said east line, South 22 degrees West 10 chains, and 25 links to the middle line of Femme Osage Creek; thence following the meanders of the middle line of said creek up the same to its intersection with the boundary line of the first tract described in deed from the grantor herein to Joseph G. Tyler, of even date herewith; thence North to corner a rock on west bank of Spring Branch at its confluence with said creek; thence North 26½

degrees West 34 chains and 22 links to corner, a rock in center of said public road; thence following the meanders of said road as follows: North 58½ degrees East 8 chains; thence North 32 degrees East 5 chains 50 links; thence North 63 degrees East 3 chains 50 links to West Bank of Little Femme Osage Creek; thence North 28 degrees East 85 links to Elm tree 15 inches in diameter on opposite side of said creek; thence same course (North 28 degrees East) 4 chains 15 links; thence North 73 degrees East 9 chains; thence South 65¾ degrees East 9 chains; thence North 74¾ degrees East 6 chains 50 links; thence North 37½ degrees East 3 chains; thence South 59 degrees East 9 chains; thence South 80 degrees East 5 chains; thence North 77 degrees East 3 chains; thence North 63½ degrees East 6 chains 14 links; to corner a rock in said Road, the place of beginning, this land being situated in St. Charles County, Missouri, and containing 160 acres, more or less.

Subject to all existing highway and public utility easements but including the fee underlying such existing easements.

[fol. 24] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered And Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the entry of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 18th day of June, 1941.

GEORGE H. MOORE,
United States District Judge.

[fol. 25] Order Transferring Fund From The Declaration Of Taking In Case No. 979.

(Filed June 18, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 987. vs. At Law.
160 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known As Tract No. 11-A, and Edward J. Linnenbringer, et al., Defendants.

Tract No. 11-A.

It appearing to the Court that in the Declaration of Taking filed with Case No. 979 on June 16, 1941, there was paid into the Registry of the Court as estimated compensation for Tract No. 11-A, described in the petition filed herein, the amount of $16,000.00;

On oral motion of the United States Attorney, the Clerk of this Court is directed to transfer $16,000.00, of the whole amount deposited under the Declaration of Taking heretofore filed, to this cause for the use and benefit of the defendants entitled thereto as to Tract No. 11-A.

GEORGE H. MOORE,
United States District Judge.

Dated, this 18th day of June, 1941.

[fol. 26] Answer Of Defendants Edward J. Linnenbringer And Emma Linnenbringer.

(Filed July 23, 1941.)

Now comes the defendants, Edward J. Linnenbringer and Emma Linnenbringer, and for their separate answer to the petition filed by plaintiff in the above styled and numbered cause say:

One: That for their answer to paragraph numbered first in said petition these defendants state that the only interest they claim in the property described in said petition is such as is hereinafter set out; that on the 30th day of

November, 1940 and for a long time prior thereto, these defendants were the owners in fee simple of said real estate together with the improvements thereon, and that on said day the defendants at the instance and request of plaintiff, and on a printed form therefore provided by plaintiff, signed and delivered to plaintiff an option for the sale of said land to plaintiff, whereby plaintiff was granted the right to purchase said real estate for the price and sum of Thirty-Four Thousand ($34,000.00) Dollars; that said op-
[fol. 27] tion further granted to plaintiff the right of immediate occupancy and use of said land for any purpose whatsoever from and after the acceptance by plaintiff of said option which right was to be exercised by plaintiff within thirty (30) days after said 30th day of November, 1940; that thereafter on the 6th day of December, 1940, plaintiff duly and legally exercised its rights under said option, and on said last named day duly and legally accepted the same, and said option thereupon became a binding and legal contract between plaintiff and these defendants whereby these defendants agreed to sell to plaintiff and plaintiff agreed to purchase from these defendants said real estate and improvements at the price and sum of Thirty-four Thousand ($34,000.00) Dollars; that thereafter pursuant to the terms of said option these defendants on the 13th day of January 1941 delivered to plaintiff a Warranety Deed dated January 9th, 1941, duly acknowledged by these defendants on January 13th, 1941, whereby these defendants for the expressed consideration in said deed of Thirty-four Thousand $34,-000.00) dollars conveyed to plaintiff the real estate in plaintiff's petition described, which deed was duly accepted by plaintiff, and on February 7th, 1941 duly filed for record in the Recorder's office of St. Charles County, Missouri, and was thereafter duly recorded in said Recorder's office in Book 197, page 177.

That said conveyance by these defendants to plaintiff of said real estate was made subject to the right of way of the M.K.T. Railroad Company, and subject to all existing highway easements, and included not only all lands described in said deed and in plaintiff's petition but also all lands incident thereto and claimed by these defendants including accreted land and land occupied by them adversely, if any.

[fol. 28] That prior to the time said deed was filed for record there was attached to said deed documentary stamps of the value of Thirty-seven and 40/000 ($37.40) Dollars.

Two: That for answer to paragraph numbered second in said petition these defendants admit that the real estate described in said petition is located in St. Charles County, Missouri and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

Three: That for answer to paragraph numbered third these defendants admit that plaintiff was authorized and empowered to acquire the lands in plaintiff's petition described by purchase, condemnation, or otherwise, but deny that plaintiff was authorized to so acquire said lands now except pursuant to the contract between these defendants and the plaintiff which is herein referred to; and admit that the United States Attorney is acting under instructions from the Attorney General of the United States; and denies on information and belief that he is so acting at the request of the Secretary of War of the United States; and states that under the contract heretofore entered into between plaintiff and these defendants the Secretary of War has no right, power or authority to make any requests for the condemnation of said property because of the said contract heretofore made by the plaintiff with these defendants; and the possession heretofore taken by plaintiff; and the deed executed and delivered by these defendants to plaintiff and accepted and recorded by plaintiff for said property.

Four: For answer to paragraph numbered fourth these defendants admit that this is an action to acquire by condemnation in fee simple absolute the land described in plaintiff's petition and the improvements thereon and the title thereto; and admit that this action is brought for said purpose by direction of the Attorney General of the United [fol. 29] States; and these defendants state that said action can only be brough pursuant to said contract between plaintiff and these defendants; and state that whether or not this action is authorized or directed to be brought by the

Secretary of War pursuant to Section 257-4 USC and Section 171, as amended, USC 50 is immaterial because of the said contract and the taking possession of said property by plaintiff, and the recording by plaintiff of the deed to said property; and admit that said two named acts of Congress approved June 26th, 1940 (public No. 667-76th Congress) and the act of Congress approved September 24th, 1940 (Public Resolution 99-76th Congress) appropriated funds for the acquisition of said property by plaintiff.

Five: That for answer to paragraph numbered fifth these defendants admit that plaintiff has the right to acquire the property described in said petition for an ordnance plant and the national defense of the United States within the purview of the sovereign plaintiff and of the Congress of the United States; and that the said property is located within the jurisdiction of this court.

Six: That for answer to paragraph numbered sixth these defendants state that they have no information sufficient to form a belief as to whether or not the opinion of the Secretary of War is, that it is necessary or advantageous to the interest of plaintiff that said property be acquired by condemnation under judicial process, and state that the opinion of the Secretary of War is immaterial because of the contract entered into by plaintiff and these dedefendants, and the possession and deed to said property delivered to and accepted by plaintiff; and admit that the money has been appropriated and is available to pay for said property.

[Vol. 30] Seventh: That for answer to paragraph numbered seventh these defendants admit that the property sought to be condemned by this proceeding and described in said paragrapth numbered seventh, is subject to all existing highway and public utility easements but including the fee underlying such existing easements, and is the same property described in the contract between plaintiff and these defendants, and the same property conveyed by these defendants to plaintiff by Warranty Deed dated January 9th, 1941 and recorded in the Recorder's office in St. Charles County, Missouri, in book 197 page 177; and these defendants make no claim to said property except such claim as is set forth in this answer.

And these defendants further say that the defendant, Elroy H. Linnenbringer, described in plaintiff's petition as tenant, was not a tenant of these defendants, and that defendant, Elroy H. Linnenbringer, has no right, title claim or interest of any kind in or to said real estate or the improvements thereon.

These defendants admit that the defendant, Darst Bottom Drainage and Protection District Number 2, is a public corporation duly organized and existing as a drainage and protection district under an order of the County Court of St. Charles County, Missouri; and that 45 acres of the real estate described in plaintiff's petition is within the boundary lines of said Drainage and Protection District; that said 45 acres of the land described in plaintiff's petition within the boundary line of said Drainage and Protection District is described as follows: Part of U. S. Survey No. 476 being that part thereof lying Southeastwardly of the Southeasterly Right of Way line of the Missouri Kansas Texas Railroad and Northwesterly of the center line of Femme Osage Creek and Northeasterly of a line bearing North 26½° West from a point on the West bank of a Spring Branch at a confluence with Femme Osage Creek 10 chains, more or less, eastwardly from the Northerly corner of U. S. Survey No. 44; that [fol. 31] said defendant, Darst Bottom Drainage and Protection District Number 2, had a lien upon said 45 acres of land for the annual installment tax levied by the Board of Suprevisors of said Drainage and Protection District on or about September 1st, 1940 in the sum of Twenty-one and 86/100 ($21.86) Dollars which has been paid; that at the time of the organization of said Drainage and Protection District it was determined that the work and improvements contemplated by said district should be payable in twenty (20) installments, the last installment to be due and payable in the year 1945; and these defendants say upon information and belief that said 45 acres of ground will be subject to liens for the annual installment tax for the years 1941, 1942, 1943, 1944, and 1945 which lien for said years, however, will not accrue until the annual installment tax is levied as provided for by law.

Eight: That for answer to paragraph numbered eighth of said petition these defendants admit that all of the property described in plaintiff's petition is subject to liens or claim for general taxes assessed as of June 1st, 1940.

Nine: That for answer to paragraph numbered ninth these defendants state that whether or not there are within the boundaries of the land, described in plaintiff's petition, roads or highways is immaterial because by the conveyance to plaintiff, as herein set out, of the fee simple title of said property the plaintiff became the owner of all such interest, and these defendants could not after the payment to them of the amount agreed upon by said contract claim or assert a reversionary interest or any interest in or to any of the premises so occupied by roads or highways; and admit that by condemnation proceedings any reversionary interest which defendants might have asserted except for said contract, possession and deed will be included and covered by condemnation thereof by the plaintiff herein.

Ten: For answer to paragraph numbered tenth of said petition these defendants state that there are no other persons except these defendants who have or can have or [fol. 32] claim to hav any interest in or to said property or the contract for the sale thereof and the deed to plaintiff.

Eleven: For answer to paragraph numbered eleventh of said petition these defendants state that there are no other persons except these defendants who have or can have or claim to have any interest in said property or the contract for the sale thereof and the deed to plaintiff.

Twelve: Further answering said petition these defendants say that on or about the 30th day of November, 1940 they granted unto the plaintiff an option to purchase the property described in said petition for condemnation together with the improvements thereon for the price and sum of Thirty-four Thousand ($34,000.00) Dollars; that thereafter pursuant to the terms of said contract said option was exercised and accepted on the 6th day of December, 1940 by the plaintiff by its duly authorized official; that said option contract and acceptance are in words and figures as follows:

Option to Purchase Land.

Know All Men By These Presents: That the undersigned Ed. J. Linnenbringer and Emma Linnenbringer his wife for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is herby acknowledged, hereby agrees for their, heirs, executors and assigns, to sell and convey to the Government for the

34000.00

consideration of thirty four thousand dollars and no cents that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

The following described Real estate being and situate, lying and being in the County of St. Charles and State of Missouri, to-wit: which is more particularly described as follows: Part of Survey No. 476 in township 45 Range 2 East, bounded and more particularly described as follows: Beginning at a point on the East line of said Survey being the intersection of said East line with the middle line of Public road leading through said Survey, a rock, thence [fol. 33] with said East line S. 22° West 10.25 chains to middle line of Femme Osage Creek, thence following the meanders of the middle line of said creek up the same to its intersection with the boundary line of the first tract described in deed from Barbara A. Tyler, dated Nov. 17, 1888, thence North to corner, a rock on West Bank of Spring Branch at its confluence with said Creek, thence N. 26½° West 34.22 chains to corner a rock in center of said public road, thence following the meanders of said road as follows: N. 58½° E. 8 chains, then N. 32° East 5.50 chains, thence N. 63° E. 3.50 chains, to West bank of Little Femme Osage Creek, thence N. 28° East 85 links to Elm tree 15 inches in diameter on the opposite side of said creek, thence the same course N. 28° E. 4.15 chains, thence N. 73° E. 9 chains, thence S. 65¾° E. 9 chains, thence N. 77° East 3 chains, thence North 63½° East 6.14 chains to corner, a rock, in said road the place of beginning, containing 160 acres, more or less. Being the same land conveyed to Lloyd C. Tyler and Barbara A. Tyler as per deed dated No. 17, 1888 and recorded in

Book 47 at page 130 of the Recorders Office of St. Charles County, Missouri.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes, and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company show- [fol. 34] ing title to be good and marketable as vested in the United States of America, free of all liens and encumbrance. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to th undrsigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at Defiance, Mo., this 30 day of November 1940.

ED J. LINNENBRINGER,
EMMA LINNENBRINGER.

Witness:
Ray H. McClain
Elroy H. Linnenbringer.

Accepted by and on behalf of the United States of America this 6th day of December 1940.

R. D. VALLIANT,
Colonel Q.M.C.
United States Army.

[fol. 35] That thereafter these defendants executed and delivered to the plaintiff a warranty deed dated January 9th, 1941, acknowledged by these defendants on January 13th, 1941 whereby these defendants conveyed to plaintiff the real estate described in plaintiffs petition; that said deed was duly accepted by the plaintiff and on the 7th day of February 1941 was filed for record in the Recorder's office of St. Charles County, Missouri, and was duly recorded in said office in book 197 page 177; that on or about said 13th day of January the plaintiff took possession of the real estate described in plaintiff's petition and has continuously since said time and now is in the

possession of said real estate; that said deed was made and delivered to plaintiff pursuant to the terms of the contract aforesaid and that under and pursuant to said contract the Attorney General of the United States had power for and on behalf of the United States to institute a proceeding in condemnation to require said property and has exercised such right; and that judgment should be entered in favor of these defendants for the amount specified in said contract to-wit: the sum of Thirty-four Thousand ($34,000.00) Dollars and interest thereon at six per cent (6%) per annum from the 13th day of January, 1941; and these defendants say that this court has no authority to appoint commissioners or to take any other or further steps in said condemnation proceeding except to enter judgment in condemnation awarding these defendants said sum as provided for in said contract; that by reason of the foregoing facts it is estopped to claim that it has any right to proceed in this condemnation proceeding except in accordance with the foregoing contract and is estopped to claim it is entitled to the appointment of commissioners and is estopped to claim any relief can be awarded plaintiff except entry of judgment in said contract.

Thirteen: These defendants further state that pursuant to the terms of the contract aforesaid the defendants fully and completely performed all of their obligations required thereunder, but they say that the plaintiff has failed, neglected and refused to pay these defendants the consideration therein agreed to be paid; that therefore these defendants are entitled to judgment for said amount and interest as above set out.

[fol. 36] Fourteen: These defendants further say that the plaintiff and defendants agreed on the price of said property to be acquired by plaintiff for said ordnance and defense purposes as above set out, and that they agreed on the price and sum of Thirty-four Thousand ($34,000.00) Dollars; and that these defendants pursuant to said agreement delivered a deed to plaintiff on or about the 13th day of January, 1941 and on said same day delivered the possession of all of said property to plaintiff, and that plaintiff has ever since remained in possession of said property and is now in possession of the same; that

plaintiff and defendants having so agreed on the price of said property, defendants are entitled to judgment in this condemnation proceeding for the sum of Thirty-four Thousand ($34,000.00) Dollars with interest at the rate of six per cent (6%) per annum from the 13th day of January, 1941.

Fifteen: Wherefore, these defendants pray that judgment be entered herein for said sum of Thirty-four Thousand ($34,000.00) Dollars as provided for in said contract with interest from January 13th, 1941 at the rate of six per cent (6%) per annum and that plaintiff be required to deposit said sum with the clerk of this court or pay said sum direct to these defendants; and that these defendants be awarded such other and further relief and orders as may be necessary to secure to these defendants the said sum with interest so agreed to be paid to these defendants for their said property.

WM. WAYE, JR.
First National Bank Building
St. Charles, Missouri.

ROSCOE ANDERSON,
1320-208 North Broadway,
St. Louis, Missouri.

WM. R. GILBERT,
1320-208 North Broadway,
St. Louis, Missouri.
Attorneys for Defendants, Edward J. Linnenbringer and Emma Linnenbringer.

[fol. 37] Answer of Defendant Elroy H. Linnenbringer.

(Filed July 29, 1941.)

Now comes Elroy H. Linnenbringer, one of the defendants named in the above numbered and styled cause, and for his separate answer to the petition filed by plaintiff in said cause admits that the real estate described in plaintiff's petition was, on and prior to January 13th, 1941 owned by Edward J. Linnenbringer and Emma Linnenbringer, but denies that he was a tenant of the owners

of said land at the time plaintiff's petition in said cause was filed, and denies that he has any interest in said real estate as tenant or otherwise, and denies that he has any interest in any award which may be made to defendants, Edward J. Linnenbringer and Emma Linnenbringer, by plaintiff on account of the condemnation of said real estate; and this defendant hereby disclaims any and all interest in said real estate, and in and to any award which may be made on account of the condemnation of the real estate described in plaintiff's said petition.

ELROY H. LINNENBRINGER,
Defendant. Wright City, Missouri.

Copy of above answer received this 29th day of July, 1941.

HARRY C. BLANTON,
By M. Walker Cooper,
United States District Attorney.

[fol. 38] Motion For Judgment For Plaintiff In Condemnation And For Defendants Fixing Compensation By Option.

(Filed April 6, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed in this cause and for dedefendants fixing defendants' compensation for the taking of said real estate in the amount named in the option, without interest, and as reasons for said motion states:

(1) That this suit was filed by plaintiff to acquire, by condemnation, the real estate described in the petition filed in this cause, that a Declaration of Taking was filed and the sum of $16,000.00 was deposited in the Registry of the Court as the estimated just compensation for said real estate;

(2) That prior to the filing of the petition in this cause the defendants and the plaintiff, through the War Department, had executed an option contract for the purchase by the United States of America from the defendants the said

real estate for the sum of $34,000.00, being the amount of compensation fixed in said option contract;

(3) The United States Supreme Court in the case of Muschany vs. United States, 89 L. Ed. Adv. Op. 492 (1945) has held an option contract to be valid and binding, which [fol. 39] option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation;

(4) That the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands described in plaintiff's petition for the purposes therein defined and against the defendants named in this cause, and against each and all of them, jointly and severally, as their rights may appear, and that the defendants, and each and all of them, jointly and severally are entitled to compensation in solido in the sum of $34,000.00, without interest, being the full amount of the compensation mentioned in said option contract;

(5) That R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, under the terms and conditions of the said option contract, have, or may have, some right, title or interest in and to the said sum of $34,000.00 mentioned in said option contract.

Wherefore, plaintiff moves the Court to enter judgment in this cause for the condemnation of the said real estate, fixing the compensation to be paid by plaintiff to the defendants in the sum of $34,000.00, and directing plaintiff to pay into the Registry of the Court the deficiency of $18,000.00 and to make an order citing all persons and corporations, including the said R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, claiming an interest in the said fund to appear in this Court and to set up and file their claims therefor.

HARRY C. BLANTON,
United States Attorney.

.....
Special Assistant United States Attorney.

Dated this 6th day of April, 1945.

[fol. 40] Order Setting Motion For Judgment For Plaintiff In Condemnation And For Defendants Fixing Compensation By Option For Hearing.

(Filed April 6, 1945.)

On oral motion of the plaintiff, by its attorneys, it is Ordered by the Court that the Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option filed by plaintiff in this cause be and the same is hereby set for hearing on the 7th day of May, 1945;

It is further Ordered that the Order of Continuance entered in this cause on the 5th day of February, 1945, continuing this cause to May 3, 1945 be and the same is hereby set aside;

And it is further Ordered that the plaintiff give notice of the date fixed for the hearing of said motion to all defendants in this cause and to their attorneys of record by mailing to each of said defendants, whose places of residence are known, and their attorneys and to R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option and a copy of this order, and by posting in the office of the Clerk of this Court in the City of St. Louis, Missouri a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option, together with a copy of this order, at least ten days before the time fixed in this order for the hearing of said motion.

GEORGE H. MOORE,
United States District Judge.

Dated this 6th day of April, 1945.

[fol. 41] Answer To Plaintiff's Motion For Judgment In Condemnation And Fixing Compensation By Option And Motion Of Defendants For Judgment As Prayed Herein.

(Filed April 26, 1945.)

Now comes defendant Edward J. Linnenbringer, in response to the motion heretofore filed by plaintiff in this cause, asking the court to enter judgment in said cause for plaintiff in condemnation and to fix defendant's compen-

sation in the amount of the option contract therein referred to, but without any interest on said amount, and for answer to said motion defendant says:

1. That he admits the allegations in paragraph 1 of said motion.

2. That he admits that the contract referred to as the option contract, in paragraph 2 of said motion, was duly executed by defendant Edward J. Linnenbringer and by Emma Linnenbringer, his wife, who has since said time died, for the purchase of said real estate as alleged in paragraph 2 of said motion.

3. That he admits the statement contained in paragraph 3 of said motion.

4. That he admits that the plaintiff is entitled to judgment in condemnation against the land of this defendant, described in plaintiff's petition for condemnation filed in [fol. 42] said cause; admits that the defendant Edward J. Linnenbringer, is entitled to compensation in the sum of $34,000.00 for his said land as of the date of taking, and admits that said amount is the value of his said land as fixed in said option contract as of the date said land was taken by plaintiff; and this defendant states that said contract provided that in the event of condemnation, said value should be fixed under a consent verdict, but this defendant denies that plaintiff has any right to escape payment of interest on said sum from the 13th day of January, 1941, the date said land was taken by plaintiff, and this defendant denies that any person other than this defendant has any interest in the moneys for payment for said real estate.

5. This defendant denies that R. Newton McDowell and the Kansas City Title Insurance Company, a corporation, or either of them, have any right, title or interest in or to said sum as alleged in paragraph 5 of said motion, or to any other sum due this defendant as payment for said real estate.

6. The defendant, Edward J. Linnenbringer, further alleges that on the 30th day of November, 1940, he and his wife, Emma Linnenbringer, granted to plaintiff an option to purchase said real estate, which option was accepted by plaintiff on December 6th, 1940; that plaintiff took possession of said real estate on the 13th day of January, 1941;

that said contract fixed the value of the just compensation to which this defendant was entitled to as of the 13th day of January, 1941; that said contract further provided that in the event of condemnation said value should be fixed under a consent verdict; that thereafter on the 18th day of June, 1941, plaintiff filed the suit in condemnation referred to in plaintiff's motion and on said same day plaintiff filed its declaration of taking in said cause and deposited in the registry of this court the sum of $16,000.00 as the estimated just compensation for said real estate so taken; that the [fol. 43] following named persons and corporations were the only defendants named in said cause, to-wit: Edward J. Linnenbringer, Emma Linnenbringer, Elroy H. Linnenbringer, Darst Bottom Drainage and Protective District No. 2, a public corporation of St. Charles County, Missouri, the Collector of Revenue of St. Charles County, Missouri, and the County of St. Charles, State of Missouri; that Emma Linnenbringer, wife of defendant Edward J. Linnenbringer, died December 23rd, 1943 and her inchoate right of dower in said real estate was extinguished; Elroy H. Linnenbringer filed an answer in said cause disclaiming any interest in said real estate; that said St. Charles County has no right, title or interest of any kind in or to said real estate or any part thereof and that the liens of said Collector of St. Charles County for general taxes and of said Darst Bottom Drainage and Protective District No. 2 for drainage taxes have been satisfied as herein shown and they have no further claim of any kind on said real estate or in the fund which will be paid as just compensation for taking said land; that on or about the 11th day of December, 1941, the defendant Edward J. Linnenbringer was, under a stipulation filed in said cause, permitted to withdraw from the Registry of this court, out of said sum deposited therein by plaintiff, the sum of $14,400.00, and said sum so [withdraw] was paid as follows:

To William H. Bruns, Jr., Collector of Revenue of St. Charles County, Missouri, for general taxes due and payable for the year 1941, as per tax statement and claim filed in this cause, the sum of $63.85

To William H. Bruns, Jr., Collector of Revenue of St. Charles County, Missouri, installment tax due and payable in 1941 to Darst Bottom Drainage and Protective

District No. 2 as per statement and claim filed in this cause the sum of $21.68

To the Clerk of this court for the benefit of Darst Bottom Drainage and Protective District No. 2 and payable to said district in the years 1942, 1943, 1944 and 1945 in the sum of $21.86 per year, the sum of $87.44.

And to defendant Edward J. Linnenbringer the sum of $14,226.86

[fol. 44] That out of said sum of $16,000.00 deposited in the registry of this court, as aforesaid, there was withdrawn the sum of $14,400.00 as above shown, and that there remains in said registry the sum of $1,600.00; that no one except the defendant Edward J. Linnenbringer has any right, title or interest in or to said sum or to any other sum due on account of the taking of said real estate.

7. Defendant Edward J. Linnenbringer further alleges that plaintiff took possession of said real estate described in plaintiff's petition on or about January 13, 1941 and alleges that this defendant is entitled to judgment in said cause for the sum of $34,000.00 with interest on said sum at 6% per annum from the 13th day of January, 1941 to June 18, 1941, and interest on the sum of $34,000.00 less the sum of $16,000.00 deposited in the registry of this court on June 18, 1941, to-wit, the sum of $18,000.00 at 6% per annum from June 18, 1941 to the date said entire sum is paid to this defendant as his just compensation for his real estate taken in this proceeding.

8. Wherefore, defendant Edward J. Linnenbringer moves the court to enter judgment in accordance with the facts herein set forth and in favor of this defendant, for the amount with interest as set out in paragraph 7 above.

WM. WAYE, JR.
First National Bank Building
St. Charles, Missouri.

ROSCOE ANDERSON,
208 North Broadway
St. Louis (2), Missouri

W. R. GILBERT,
208 North Broadway
St. Louis (2), Missouri

[fol. 45] (List of Checks deposited in Registry of District Court to cover certain Lands in Weldon Spring Ordnance Project.)
(Filed May 17, 1945.)

In The United States District Court
Eastern District Of Missouri
Eastern Division

Weldon Spring Ordnance Project

Cases No. 767	— Deficiency —	$26,900.04	818 — Def. —		$114.00
765	— " —	7,028.20	817 — " —		8,140.00
766	— " —	22,365.00	820 — " —		19,193.00
763	— " —	3,125.00	822 — " —		6,760.00
764	— " —	22,791.00	824 — " —		4,770.00
771	— " —	6,170.00	823 — " —		13,992.00
772	— " —	660.00	854 — " —		6,100.00
777	— " —	5,855.00	877 — " —		3,725.00
778	— " —	2,935.20	865 — " —		567.00
779	— " —	3,967.83	866 — " —		7,510.00
780	— " —	2,000.00	863 — " —		932.50
781	— " —	875.00	873 — " —		7,457.20
782	— " —	5,792.00	872 — " —		6,900.00
783	— " —	5,700.00	858 — " —		3,443.00
784	— " —	4,368.00	860 — " —		8,040.00
785	— " —	34,250.00	859 — " —		16,480.00
786	— " —	2,630.18	862 — " —		2,200.00
796	— " —	19,694.00	879 — " —		1,440.00
805	— " —	21,511.25	875 — " —		5,729.00
812	— " —	6,080.00	876 — " —		7,695.00
810	— " —	110.00	856 — " —		4,300.00
813	— " —	4,428.75	868 — " —		1,380.00
814	— " —	7,283.00	869 — " —		3,697.00
797	— " —	3,825.00	960 — " —		48,500.00
806	— " —	2,940.00	978 — " —		14,132.00
808	— " —	11,140.00	985 — " —		1,240.00
811	— " —	5,435.00	988 — " —		21,374.25
834	— " —	4,878.00	984 — " —		1,500.00
841	— " —	8,670.00	999 — " —		2,140.00
833	— " —	2,150.00	1000 — " —		500.00
840	— " —	3,580.00	1001 — " —		2,500.00
832	— " —	760.00	1002 — " —		11,115.25
827	— " —	7,940.00	1003 — " —		29,297.00
843	— " —	4,620.00	979 — " —		7,120.00
830	— " —	1,200.00	981 — " —		25,000.00
829	— " —	312.00	980 — " —		16,312.50
839	— " —	4,860.00	989 — " —		3,100.00
838	— " —	2,440.00	986 — " —		2,600.00
844	— " —	1,433.36	987 — " —		18,000.00
835	— " —	6,960.00	992 — " —		933.00
826	— " —	3,760.00	993 — " —		3,617.00
852	— " —	17,460.00	994 — " —		1,100.00

853	"	850.00	995	"	16,000.00
774	"	1,563.00	997	"	20,400.00
798	"	8,260.00	991	"	1,750.00
803	"	4,100.00	1006	"	3,600.00
789	"	10,820.00	1010	"	32,804.45
792	"	9,775.74	1015	"	23,129.45
800	"	36,720.00	1014	"	450.00
790	"	8,440.00	1021	"	7,140.00
791	"	9,042.00	1019	"	12,174.00
793	"	5,100.00	1020	"	6,170.20
794	"	17,985.00	1648	"	1,670.00
804	"	14,780.00	1652	"	2,723.00
819	"	3,050.00			

$920,085.35

[fol. 46]

Check No.			
	8,051,506		$87,595.70
	8,051,507		48,500.00
	8,051,508		4,393.00
	8,051,509		115,932.50
	8,051,510		182,604.74
	8,051,511		85,468.10
	8,051,512		229,583.57
	8,051,513		7,028.20
	8,051,514		83,798.54
	8,051,515		22,365.00
	8,051,516		26,900.00
	8,051,517		22,791.00
	8,051,518		3,125.00

$920,085.35

of the Treasurer of the United States, in the sum of $920,085.35, to the order of the Clerk of the United States District Court for the Eastern District of Missouri, Eastern Division, deposited by the plaintiff for the lands described in the petitions, the aforesaid sum of $920,085.35 being deposited by the plaintiff in the Registry of the Court herein as to the aforesaid lands, for the use and benefit of the person or persons entitled thereto, the same to be applied under orders of this Court.

HARRY C. BLANTON,
United States District Attorney.

Received the above mentioned checks and deposited same in the Registry of this Court, this 17th day of May, 1945.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.

[fol. 47]

Opinion of Court.

(Filed June 8, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
vs.
Certain Lands in St. Charles County, Missouri, Known as The Weldon Spring Area, Defendants.

No. 765; No. 767; No. 771;
No. 777; No. 781; No. 785;
No. 791; No. 797; No. 805;
No. 807; No. 810; No. 811;
No. 817; No. 827; No. 835;
No. 841; No. 865; No. 874;
No. 875; No. 877; No. 985;
No. 987; No. 991; No. 995;
No. 997; No. 1000; No. 1001;
No. 1010; No. 1015; No. 1021.

All of these cases, except Numbers 807 and 874, now come before this Court on motions filed in each by the Plaintiff, United States of America, for entry of judgment in the amount of the compensation fixed in certain option contracts, but without interest thereon, and certain countermotions by Defendants asking for judgment with interest on the principal amounts since the date of taking. Numbers 807 and 874 (Muschany and Andrews cases) are here on motions by the Plaintiff to delete interest from judgments already entered, but the issues therein presented differ only slightly. This opinion is to be considered as filed in and ruling all of the above numbered separate proceedings.

The lengthy history of this condemnation litigation is already adequately documented in the Reports and needs

no further recitation. The facts of the original proceedings appear in the contrary opinions of District Court Judges Davis and Collet, United States vs. Certain Land Situate in St. Charles County, Mo., et al., 46 F. Supp. 921, and United States vs. 94.68 acres of Land in St. Charles County, Mo., et al., 45 F. Supp. 1016; in the Eighth Circuit Court of Appeals opinion in United States vs. Muschany, 139 F. 2d, 661; and in the opinion of the Supreme Court of the United States in Muschany vs. United States, 89 L. Ed. 492. In addition, the facts [fol. 48] surrounding the present motions are ably stated in the opinion of Judge Hulen filed in Division No. 2 of this Court on the 4th day of May, 1945, covering identical motions in companion cases to those now before this division. The issues here presented differ in no respect from those decided by Judge Hulen and, with the above references to source materials where the facts may be found, the Court will state its views and holding on the issues presented, which, I deeply regret, are not in accord with those of my learned brother Hulen.

After careful consideration of the various submitted briefs of counsel, the real issues presented for decision appear to be four in number. First, the question is raised whether there is anything in the facts of these cases that makes them a particular type of condemnation proceeding to which that part of the Statute allowing interest to landowners does not apply; second, whether if in such a condemnation proceeding interest is ever allowable, these landowners have by any contract, election, waiver, stipulation or option done anything to waive, give up, or bar themselves from, a right that they might otherwise have: third, whether, if the landowners are entitled to interest, they are entitled to it from the date of the actual taking or only from the date of the filing of the declaration of taking: and, fourth, whether the original decrees entered only in the Andrews and Muschany cases (those appealed to the Supreme Court), which expressly provide for interest, are final and binding on the interest issue in those two cases and, also, binding as precedent or through special agreement of the Government in all the other cases. The Court will discuss the above issues seriatim.

[fol. 49] There is no dispute between the parties that the general rule is (absent a contract or statute evincing a contrary intent) that interest does not run against the United States upon claims or contracts even though there has been an unreasonable delay or default in the payment of the principal upon the part of the Government. Tilson vs. United States, 100 U. S. 43; United States vs. North America Company, 253 U. S. 330; Angarica vs. Bayard, 127 U. S. 251; United States vs. North Carolina, 136 U. S. 211; Smyth vs. United States, 302 U. S. 329. Likewise, there is no dispute that in ordinary condemnation proceedings an exception is made which Congress has by statute approved and codified. Title 40 U. S. Code, Section 258a; Seaboard Railway vs. United States, 261 U. S. 299; United States vs. Rogers, 255 U. S. 163. The parts of said Statute material here are:

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.******

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount

finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall [fol. 50] have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency" (Emphasis the Court's)

The difference of opinion between the parties first arises on the question of whether the particular facts here cause these proceedings to be a type of condemnation proceeding to which that part of the statute relating to interest is inapplicable.

The Court is of the opinion that under the policy of Congress, as expressed by the above statute, and under the facts, there is no valid reason why these landowners should not receive the benefit of the statutory exception. It is true that the negotiations between the Government and the landowners originally resulted in option contracts. It is also true that those contracts provided for condemnation proceedings under certain restricted circumstances. Those facts, however, do not change the circumstances that there are now before this Court condemnation proceedings brought under the general condemnation statute and in no respect different from any other like proceedings except in the method of ascertaining the value of the land. These are not friendly condemnation proceedings for the purpose of clearing title but, as the long history of litigation prior to these motions will readily prove, they are as completely antagonistic and adversary actions as this Court has ever seen. These proceedings for condemnation were certainly not brought within the terms of the

[fol. 51] option contracts, since those options provide only for friendly proceedings "if for any reason the title to the land is not approved by the Attorney General." It is certain that no other type of condemnation proceeding was within the contemplation of the parties when the option contracts were entered into. The history of these cases shows that the Government brought these actions as straight adversary condemnation proceedings, in complete disregard of the option contracts, and that the entrance of those contracts into the issues was by way of equitable defense on the part of the landowners. Those option contracts have played a part, therefore, in these proceedings to the extent of fixing the worth of the land, but it would be completely erroneous to say that they in any way make these a different type of condemnation proceeding, or that those options have been [illegible] enforced in their entirety.

Such being the facts, no reason appears [illegible] face of the Statute why those landowners, different from any other landowners, should be divested of the right to interest on the deficiencies of their awards. The statute merely provides that "said compensation shall be ascertained and awarded in said proceeding and established by judgment". No distinction is made in the statute between different methods of ascertaining the compensation. Had the value of the land here been found by a jury, by commissioners, or by stipulation filed in the case, the statute in the absence of express waiver would make no distinction in regard to interest in any case where a deficiency in the deposit existed. Why, therefore, should there be any distinction because the value of the land was fixed by an agreement prior to suit between the parties, which agreement, it should be noted, was enforced against a recalcitrant Government on equitable principles?

[fol. 52] These landowners certainly come within the spirit of the statute and the intent of Congress. The history of the statute, as admitted by the parties, shows that its purpose was to grant interest not as interest, but as part of the compensation, i.e., to compensate for the loss of the use of the land, or the use of the value thereof in money, pendente lite, Seaboard Railway vs. United States,

supra; United States vs. Rogers, supra. The properties of these people were taken from them some time prior to the institution of these suits and only since submission of the present motions has the Government begun to deposit the full amounts due under the options. Thus, they have lost both the use of the land and the use of their money, and it was just such a situation as this that Congress intended to remedy by making the unusual exception to the rule that the United States pays no interest.

To say that this is a different type of condemnation proceeding pursuant to contract is to ignore the fact that the contracts never had been enforced in full and never will be. The original proceedings were not suits for specific performance of the contracts because, had they been, the result should have been the dismissal of these actions. On equitable principles the amount of compensation was fixed and charged against the United States under the terms of the options, but the United States itself has defaulted and still defaults on many of the terms of the contracts. For example, it has not—as the contracts provided—accepted deeds and paid the agreed purchase price upon the furnishing of satisfactory certificates of title. That it can and will never do. Neither has it brought condemnation proceedings for the sole reason assigned in the options for doing so. Nor has it, when bringing condemnation proceedings, followed the terms of the contracts, which provide that—

"The Government will proceed to acquire the land by condemnation proceedings instituted in the District Court [fol. 53] of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court." (Emphasis the Court's).

The requirement for a deposit upon the filing of the petition has certainly never been performed by the Government and never can be. The Government has made no offer to consent to a verdict and yet, through its Agents, contends that it simply wishes to go through with the original contract. That, it is manifest is impossible.

The essential error in the position of the Government lies in the assumption that the effect of the opinion of the Supreme Court was to convert these condemnation proceedings back to simply technical processes for the perfection of title in a proceeding contemplated by the parties and within the terms of their contracts; or, stated in another way, to convert these proceedings into an identity with an action in the Court of Claims for specific performance of a contract. This argument erroneously assumes, first, that the Supreme Court had the power and desire to restore the status quo ante; secondly, that by striving and prevailing for the prices promised them by their Government (in the adversary proceeding forced upon them) these landowners somehow bound themselves to all the concomitants of a discarded contract procedure and simply turned back the clock some years, thereby wiping out all that had intervened; and, thirdly, that there is something inconsistent in allowing the landowners their promised price as a matter of equity and also giving them the benefits arising solely by statute from a method of procedure which was forced upon them by the Government. The reasons why the prices provided in the options were compulsory imposed upon the Government by the Courts are that it was felt unconscionable and contrary to public interest to allow the Government, after accepting unusual benefits, to renege on its solemn word, and justice de- [fol. 54] manded that the landowners be given by way of ascertainment of value in condemnation that which they would have received had not the Government breached the contracts. In other words, there is actually nothing in the record of this case to show that the contracts per se were to be enforced. The Government was merely allowed to follow its chosen and elected course subject only to the duty to give the promised price. Any concomitants arising, however, from that elected course (i.e., interest) were not negatived or touched upon. Since, therefore, the Government has elected its remedy of condemnation, this Court can see no valid distinction between these proceedings and any others, unless there is something in the record to show that the landowners here have waived a right that they might have otherwise possessed. The Court will next address itself to that question.

The option contracts involved in these cases can be the only evidence of any such waivers or elections; and the Government here makes no contention that any circumstances other than those contracts constitute any such waivers or agreements. Thus, the question simply is, did the landowners by entering into such option contracts thereby stipulate and agree that no matter what happened the sums therein specified should be the total compensation for their lands? This Court, in answer to that question, can find nothing on the face of those option contracts, or from the surrounding circumstances, to indicate any such intention on the part of the landowners, or, for that matter, the Government. Had the contracts been performed, either by conveying or by a friendly condemnation proceeding, as provided in the options, the argument advanced by the Government might have strength. But, as it was, the parties were contracting for the sale of their land and they naturally made no provision for interest. Had [fol. 55] the contracts been performed in the manner contemplated on their face they would have needed no interest and been entitled to none. However, those contracts were not executed and never will be. How, therefore, can it be said that agreements to take no interest under the condemnation statutes can be found in contracts whose subject matter was something totally different than the proceeding that was subsequently brought? At the time the option contracts were executed the present proceedings were certainly not in the minds of any of the parties, and their possibility is no where reflected in those contracts. The landowners stated what they would take for their land in certain eventualities, which eventualities were the delivery of deeds in return for money (or, a friendly title clearing condemnation in a certain event). Neither of these eventualities ever occurred, but a totally different, completely unforseen and most unwelcome litigation was commenced. The general law of contracts would certainly forbid a holding which bound a contracting party by an instrument the subject matter of which was entirely different. The Government not the landowners, breached the contract, and that contract is dead and will never be performed except that the landowners, by reason of the final holding of the Supreme

Court of the United States, will be put in a monetary way in the same position as if the contracts had been executed. The question of interest in this adversary condemnation proceeding is not within the four corners of the contract at all, and is to be determined by operation of law.

Argument has been presented in behalf of the landowners that even if the option contracts could have some relevancy to the question of interest under the condemnation statute, that they have relevancy only to the extent that in condemnation they show an intent to fix the value of the land but not the total compensation therefor. This argument [fol. 56] is based on the contention that there is a difference in condemnation between the words "value" and "compensation", and that the word "compensation" includes not only the value found by the trier of the facts but also any additional items required by law, such as the statutory interest. A decision on this problem, in view of the preceding statements of this opinion is, of course, not necessary, since the Court has already decided that the contracts have no bearing at all on the interest question. However, the Court wishes to point out that it is in agreement with this contention insofar as it believes that if by any stretch of the imagination it can be held that the parties were contracting in contemplation of an adversary proceeding in condemnation, then they were contracting only to the extent that they were fixing the value of the land in the same manner that Commissioners or a Jury would fix the same, and without any stipulation to cover the entire condemnation proceeding (including matters like interest, which are handled by operation of the Statute). The option contracts, when they speak of the contemplated friendly condemnation to clear title, provide for "a consent verdict fixing the award at the agreed value". They further provide for an immediate deposit of that valuation. Certainly, under the terms of the Statute where the Government agrees to and does deposit an agreed valuation there can be no question of interest. With this in mind the landowners' agreement to a value would have constituted their entire compensation because of the contemporaneous agreement of the Government to instantaneously pay in that value and cut off the right to interest.

Nowhere, however, can words be found that show a contemplation by the landowners that they are fixing the possible total compensation that they would take in condemnation regardless of whether the Government, in accordance with its mutually dependent promise, paid in the money subject to the landowners right of user.

[fol. 57] It should be noted, before turning to a consideration of the remaining stated issues, that the Court has found, after consideration of the various authorities cited, no binding authority on the previously discussed issues, and feels that in its decision interpreting the Statute under the facts the court must and is at liberty to arrive at its conclusions independently. All of the authorities cited by the Government to the effect that interest is generally not allowable against the United States, except where contract or statute so provides, are of interest, but actually of no assistance to the Court in the cases at bar.

The only authorities relied on by the Plaintiff that the Court has found to even touch upon the propositions here are United States vs. 3.25 Acres of Land in Seneca County, New York, 53 F. Supp. 884, and United States vs. Certain Lands in St. Louis, 58 F. Supp. 305, both District Court cases, and the latter decided by Judge Duncan of this District. Although neither is in any way decisive, since their special applicability has been strongly urged, a statement of the Court's views on them is made necessary.

The Court believes that the issues involved in the case before Judge Duncan were not at all the same as those here presented and that that case is so [distginishable] as to be of no value as even influential authority. That suit was begun as an ordinary adversary condemnation, but while pending a proposition was made by the owner of the land for settlement of the case. A settlement was agreed upon, accepted, and a judgment rendered for the exact amount of the contract. A motion was filed by the landowners asking for interest from the time of the entry of judgment until payment, on the theory that the Government had unreasonably delayed the payment. Interest was denied by the Court. First, it should be noted that the interest question arose from a demand for interest after entry of judgment, and not before. Second, the contract, in

[fol. 58] the form of an accepted offer of settlement filed in the case, provided that—

"The consideration hereinabove set forth shall be the amount of the award to be decreed for all damages and compensation by reason of the taking of said lands by such judicial proceedings and we hereby agree that this offer to sell, if accepted, shall, without more, constitute a stipulation, which may be filed in said suit as final and binding evidence of the award to be made in such proceedings and paid into Court for the benefit of all persons entitled thereto."

Thus, when the contract was made, an adversary proceeding was not only in mind but was actually the subject matter of the contract. That contract was a compromise, and that with which they were dealing was well within the minds of the landowners. If they agreed to accept the sum named in the settlement for "all damages and compensation" they would certainly be presumed to include in their computations of what they would take not only the original value of the land but any other claims they might have had to that date against the Government, such as interest (or compensation for the deprivation of use pendente lite). L. C. 307, Judge Duncan states:

"The difficulty with defendant's position is that by its own action it removed itself from the provisions of the statute. If this statute were applicable here defendant would be entitled to interest on $35,000 from the date of taking on June 19, 1939, until the date of the payment, August 14, 1944, but defendant makes no such claim. On the contrary, it bases its claim upon the ground of unreasonable delay in the payment of the amount agreed upon, and for which judgment was entered. It could make no other claim in view of the clear, unambiguous statement in its offer that: * * * the amount of the award to be decreed for all damages and compensation by reason of the taking of said land * * *. (Emphasis supplied)

From this language it must be determined that the defendant's offer was a full and complete offer, not one fixing an amount as of the time of taking, but as of the time of the acceptance and payment."

From the above quotation it can be clearly seen that the [fol. 59] real basis of decision was a finding of fact that the landowners had voluntarily given up and waived any right they had, and that is just exactly what this Court finds that the landowners in the cases at bar did not do. There is no difference to be found in that opinion as to the law, there is simply a factual situation not here present. It should also be noted about that case, that there the landowners did not petition clearly for interest under the statute, but went outside of it relying on alleged unreasonable delay, and, as before noted, it is clearly the law that no matter how arbitrary or unreasonable the delay and how great the hardship imposed, the United States may not be forced to pay interest absent a statute or contract providing therefor. That case was decided on its facts, and the facts in the cases at bar are in no way identical.

The other District Court case, United States vs. Certain Lands in Seneca County, New York, supra, may be more in point, it is true, but still is essentially distinguishable from the cases at bar for the same reason as Judge Duncan's opinion. Although the exact fact situation present in that case is not made clear by the opinion, it should be noted that Judge Burke seemed to be of the very definite view that that proceeding was brought completely within the terms of the option contract, and not, as in the cases at bar, in derogation and denial of those contracts. The option provided, as here, for friendly condemnation to clear title and although the opinion does not show the Government's motive in bringing the matter to Court, surely it must be presumed, since Judge Burke seems to so imply, that the action was brought within the rights given by the contract. All through the opinion appears the assumption that a proceeding contemplated by the option had occurred and that, therefore, the contract should bind. [fol. 60] This is best illustrated by the very words of the Court, l. c. 885:

"By agreement of the parties, therefore, it was left to the determination of the United States, through its officers in charge of the matter, to determine, notwithstanding the prior acceptance of the option, whether the title was un-

satisfactory for purchase by deed. By express agreement the Government had the right, at its election, to acquire title by condemnation and the church agreed in that event to cooperate to that end and the option price was to constitute conclusive evidence of the true value of the whole property. When reasonably and fairly exercised, as it appears to have been in the light of the matters set forth in the motion papers, the determination to acquire title by condemnation is not open to question and when resorted to, the express agreement of the parties as to compensation must control. That agreement was that the option price 'shall be final and conclusive evidence of the true value of the whole of said property and of the proper award to be made in such proceedings'. The possibility of the Government electing to acquire title by condemnation was not an unforseen circumstance and in such event, that there would be some delay in the proceedings might reasonably have been inferred. The option, however, contained no provision for adding anything to the award to compensate for delay in the payment of compensation. The Court may not supply what the parties themselves have failed to include in the agreement." (Emphasis the Court's)

That being the situation, the case can give no assistance where, as here, the Government itself departs from the contract, and makes its performance impossible, and does not exercise any contract right, in the words of Judge Burke, "Reasonably and fairly".

Attempts have been made to show guiding principles in the Supreme Court opinion in Muschany vs. United States, supra. The Court, however, can find no guidance therefrom and is certain that any language of the Supreme Court that has been used by either of the parties to this suit to justify their conclusions is not pertinent, since it is only too clear that Supreme Court of the United States was in no manner addressing itself to the issues now raised by these motions.

[fol. 61] Since the submission and briefing of these motions this Court's attention has been directed by defendants to the decision of the United States Circuit Court of

Appeals for the Fifth Circuit in U. S. vs. Marion Baugh, et al., F. 2d. , decided May 4, 1945. As in Judge Duncan's opinion in US vs. Certain Lands in St. Louis, supra, the suit was commenced as an ordinary condemnation and a stipulation was subsequently filed. The Fifth Circuit held that the landowners were entitled to interest from the filing of the stipulation until deposit. US vs. Baugh, et al. is of interest not because it necessarily expressly rules the issues here, but because it contains thought closely allied to this Court's holding. The stipulations there waived hearing before commissioners, consented to decrees vesting title, and agreed that certain sums be adjudged as just compensation. They further read:

"The foregoing stipulation is made to expedite the vesting of title in the plaintiff, the United States of America, and the payment of just compensation for such lands to the owners thereof, and it is the purpose and intent hereof to vest in the Court, without any further proceeding any notice, full authority to close such action by final judgment and to disburse the funds in accordance therewith."

After the filing of these stipulations an eight months' delay ensued before deposit by the government, although possession had been taken when suit was commenced. Judge Waller discusses the effect of these stipulations, l.c. , and the quotation suffices to illustrate the analogous reasoning to this court's:

"In the present case the government did not take a deed from the landowner as in an outright purchase, but it acquired title and possession by condemnation. The stipulation merely had the effect of relieving the government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the [fol. 62] stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing

just compensation there seems to be no reason to conclude that the landowner impliedly waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights." (Emphasis the Court's)

Again, the learned Judge said, l.c.....:

"But the government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract.

The Constitution no more permits the deprivation of money without just compensation than it does the deprivation of the use of land without just compensation." (Emphasis the Court's)

Although the facts are different, the case is sound authority for this Court's holding that where a contract fixes the value of the land, the presence of such contract does not affect the matter of interest, which is governed by operation of law.

It is further of interest to note that the Court in US vs. Baugh, states, l.c.

"The settled law of the land at the time a contract is made is a part of the contract and must be read into it." This is in direct answer to the plaintiff's underlying argument in the cases at bar that the contract upon which an award is based must provide for interest for it to be allowable. It would seem, however, that the rule is, to the contrary, that a contract is presumably made in view of the law existing (which gives a right to interest) and if this presumption is to be altered, the contract must so provide.

[fol. 63] The third issue, as above stated, is whether, having decided that the landowners are entitled to interest, they are entitled to interest from the date of actual taking of the land, or from the date of the filing of the declaration

of taking in this Court. Here, it is the Court's opinion, that the latter date must govern. Although it is true that the Government went into possession of these lands sometime prior to filing of these condemnation suits, and withheld the use of the land from the landowners during that intervening period, it is also true that the right in the landowners to interest now is bottomed upon the Statute. This Statute is in derogation of the general rule that no interest is allowable against the sovereign, and strict conformity must, therefore, be required in the application of the exception to these cases. For any loss of the use of their lands after the actual taking but prior to the filing of the declaration of taking, the landowners right lies outside of the condemnation laws and in contract, and they must, therefore, go uncompensated in the same manner that persons dealing with the sovereign in matters other than condemnation receive no interest.

Finally, considering the fourth issue, it has been argued that since the original decrees, entered in the Muschany and the Andrews cases (those appealed to the Supreme Court, provided a judgment for the principal amount of the options plus interest, and since those decrees have been affirmed by the Supreme Court of the United States, that the question of interest is res adjudicata in these cases at least. Additionally, it is argued in this line, that those decrees form influential or binding precedent for all of the other cases and that, further, because of some commitment by counsel for the Government the landowners in the other cases are en- [fol. 64] titled to the same treatment in all respects as Muschany and Andrews.

The question of whether interest is res adjudicata in the Andrews and Muschany cases depends essentially on whether those decrees were, in the form written, affirmed by the Supreme Court, or whether they were made subject to revision or re-entry. The Circuit Court of Appeals, of course, reversed the findings and decrees in those cases, which would have the effect of setting the same aside. The Supreme Court, however, reversed the Court of Appeals and in its mandate ordered that the Muschany and Andrews

cases be remanded to the District Court for further proceedings in accordance with its opinion. Although it is true that the Supreme Court did not expressly state that the decrees in the form written were affirmed, it appears that such is the undoubted effect. A reversal of the Court of Appeals must, of necessity, reinstate the rule of the District Court if nothing more is done. The order of the Supreme Court, remanding to the District Court for further proceedings in accordance with its opinion, can only mean that since the opinion was in accord with the District Court that that latter court should proceed as it had been proceeding prior to appeal. Although the language of the Supreme Court's mandate may not be expressly an affirmance, it cannot be interpreted in any other way, since there are no further proceedings to be had other than execution of the judgments previously entered.

"The Court recognizes, however, that the issue of interest was not raised before either of the appellate courts, and that neither opinion adjudicates that question. However, that is not the fault of the landowners since the original decrees gave them interest, and those decrees became final unless attacked and set aside on appeal. In view of the Court's [fol. 65] holding on the other issues previously discussed in this opinion, a decision of the present issue is, of course, not necessary in order to hold with the landowners. However, the Court feels that so far as the Andrews and Muschany cases are concerned justice requires that the landowners be given the benefit of the Government's failure to seek reversal of the decrees already entered in their favor. The Government, it appears to this Court, participated in an appeal through two courts, alleging error committed by this court. The question of interest was squarely present in the record and the Government could have attacked that during the same appeals. Now, however, having been defeated on the question of the validity of the option contracts the Government seeks to pick another point in the original decrees which it believes erroneous and attack the landowners on that. Such procedure certainly is violative of all tenets of appellate procedure.

As for the effect of this upon the other cases in which no decrees were entered, it certainly cannot be said that the opinions of the Supreme Court in the Muschany and An-

drews cases form any precedent on the interest question. The issue of the interest awards not having been attacked on appeal, and the opinions of both the Court of Appeals and the Supreme Court being absolutely silent thereon, it would, indeed, be erroneous to say that because the Government neglected to allege an error and obtain a decision on the interest provisions in the Muschany and Andrews decrees that they have thereby made binding or even influential law for other cases.

However, aside from that question, there is the suggested commitment of the Government, which would cause all other cases to follow the exact result of the Andrews and Muschany cases. This Court feels that in all probability good conscience might dictate that all landowners should be given the same treatment as those in the test cases, since they [fol. 66] doubtless failed to press their cases to judgment in reliance on an assumption that all cases would result identically. However, the Court further feels that no agreement by the Government intended to cover the question of interest has been shown and is, therefore, not disposed to hold that the Government is bound in that regard. Adequate reasons have been stated elsewhere in this opinion for allowing interest to all landowners, and the Court, therefore, must rule this issue as to all landowners other than Muschany and Andrews against the defendants.

In conclusion, therefore, the Court is of the opinion that the landowners are entitled to entry of judgments which shall include interest upon the deficiencies in their awards from the dates of the filing of the declarations of taking in these cases. The Court is duly appreciative of the position of the Government and the vigilance of its officers in protecting its rights. Great skill and diligence has been exercised by those agents, and the Court believes that their efforts were certainly not unreasonable in light of the contrary opinions arrived at by the various jurists to whom the issues have so far been presented. However, the Court feels that the landowners, within the spirit of the Fifth Amendment of the Constitution of the United States, are entitled to a just compensation for their lands, and that that includes the right to receive as additional compensation the interest granted by the Statute for their loss of the use of their land, or the use of their money, during the long period when the

officers of the Government were attempting to diminish the amounts to be paid to them. As already stated, it appears to this Court that these landowners so clearly come within the class intended by Congress to be benefited by the [fol. 67] Statute, that, although the Government's earnest attempts to obtain reversals were in the best of faith, the landowner should not be made to suffer because of those attempts.

Wherefore, the Court directs that in accordance with this opinion drafts of judgments carrying interest on the undeposited deficiencies from the filing of declarations of taking be presented in all of the above styled cases, except the Muschany and Andrews cases in which decrees have already been entered, and that, also orders ruling the numerous motions and counter-motions be supplied. Upon submission for approval and settlement of the same appropriate orders and decrees will be entered.

GEO. H. MOORE,
United States District Judge.

Dated this 8th day of June, 1945.

[fol. 68] Findings And Judgment.

(Filed July 2, 1945.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 987. vs. At Law.
160 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known as Tract No. 11-A, and Edward J. Linnenbringer, Et Al., Defendants.

Tract No. 11-A.

Now on this day the Court having heretofore heard a motion filed by plaintiff for judgment for plaintiff in condemnation of the land described in plaintiff's petition filed in this cause, and for defendants fixing the compensation to be paid by plaintiff to the defendants in the sum of $34,000.00, the price agreed upon in the option contract, referred to in said motion, without interest, and the answer to said mo-

tion and the countermotion of defendants for judgment against plaintiff for said sum with interest, and evidence having been heard and arguments of counsel having been made, and said motions having been taken under advisement, and the court being now fully and sufficiently advised in the premises doth find that the plaintiff instituted this proceeding on the 18th day of June, 1941 by the filing of its petition in condemnation on said date against the defendants named in said petition, to condemn the lands in said petition and hereinafter described, as in such cases made and provided for by the laws of the United States of America.

That on said same day, to-wit, June 18th, 1941, plaintiff filed a declaration of taking of the real estate described in plaintiff's petition, as provided for by Title 40, Section 258a, of the United States Code.

That thereafter all of the defendants named in said petition were duly served with process as required by law, or duly entered their appearance in said cause, and that this court has jurisdiction of the subject matter of this cause and all of the parties thereto.

That prior to the filing of plaintiff's petition herein, and [fol. 69] prior to the filing of said declaration of taking, defendant Ed J. Linnenbringer, gave to plaintiff an option to purchase said real estate for the sum of $34,000.00, which option was dated the 30th day of November, 1940, and which option was thereafter accepted by plaintiff on the 6th day of December, 1940; that said option contract was set out in full in the answer filed by defendant Edward J. Linnenbringer and Emma Linnenbringer to the petition filed by plaintiff in this cause.

That, upon the acceptance by plaintiff of said option contract, possession of said land, hereinafter described, was taken by and has ever since been in plaintiff, United States of America.

That, since the institution of this proceeding and the filing of said declaration, the Supreme Court of the United States has held binding on the parties to this cause, insofar as concerns the worth or value of the land at the time of the taking by the United States of America, an option contract

for the sale of land, the provisions of which are the same as the option contract aforesaid, except as to dates, the names of the vendors, the description of the property and the sale price of said land; that under the aforesaid decision of the Supreme Court of the United States and the provisions of said option contract, the said sum of $34,000.00 was and is the agreed value or worth of the land, hereinafter described, at the time of the taking of said land by plaintiff, and the defendants became and were entitled to have the value or worth of said land fixed in this proceeding at said agreed value as of the date of taking thereof.

That on the 18th day of June, 1941, plaintiff filed in this cause the aforesaid declaration of taking of the land therein and hereinafter described, and on said day caused to be entered of record in this cause a judgment of taking on said declaration of taking, whereby the free simple title to said land became fully vested in the United States of America, plaintiff herein, and the title to and possession of said land was then and there, and has ever since been in the plaintiff, United States of America, and none of the defendants have since said time had any right, title or interest in or to the same.

[fol. 70] That at the time of the filing of said declaration of taking on June 18th, 1941, there was deposited in the registry of this court the sum of $16,000.00 as the then estimated compensation stated in said declaration of taking for the appropriation and taking by plaintiff of the fee simple title to the land in said declaration of taking, and hereinafter described, but that said deposit was erroneous and insufficient in amount in that the same failed to equal said agreed value or worth of said land as of the date of taking and appropriation thereof by plaintiff.

That on the 17th day of May, 1945 there was deposited in the registry of this court by plaintiff an additional sum of $18,000.00 as additional compensation for the taking and appropriation by plaintiff of the fee simple title to the land in said declaration of taking and hereinafter described.

That the sum total of the combined deposits heretofore made by plaintiff into the registry of this court in this cause were and are erroneous and insufficient in amount and did not and do not constitute the just compensation for

the taking of said land hereinafter described, in that plaintiff in making said deposit on May 17th, 1945 failed to include therein interest on said sum of $18,000.00 which plaintiff had heretofore withheld from the registry of the court as aforesaid, at the rate of 6% per annum from the time of the filing of said declaration of taking, to-wit, the 18th day of June, 1941 until said 17th day of May, 1945, which interest constitutes a part of the just compensation required to be paid by plaintiff for the taking and appropriation by it of the lands hereinafter described, and that defendants are entitled to have the same paid by plaintiff into the registry of the court.

That plaintiff's petition and the proceedings in this cause set forth a cause of action for the condemnation, appropriation and acquisition by plaintiff, by proceedings in condemnation, of the fee simple title to the land hereinafter described, which land was and is necessary to provide for the establishment of an ordnance plant for the national defense of the United States of America and for other military uses incidental thereto in connection with the Weldon [fol. 71] Springs Ordnance Plant; that at the time of the filing of said declaration of taking herein, no person other than the defendants named in plaintiff's petition had any right, title or interest in or to the lands therein and in plaintiff's petition and hereinafter described, or any part thereof; that the awarding to plaintiff in this condemnation proceeding of a judgment in condemnation will confirm and perfect in plaintiff, finally and completely, the fee simple title to said land, in conformity with the laws of the United States of America.

That the land described in plaintiff's petition is the land described in said declaration of taking, referred to herein, and is described as follows, to-wit:

Part of Survey No. 476, Township 45 North, Range 2 East, described as follows: Beginning at a point on the east line of said Survey being the intersection of said east line with the middle line of the public road leading through said Survey, a rock; thence with said east line, South 22° degrees West 10 chains, and 25 links to the middle line of Femme Osage Creek; thence following the meanders of the middle line of said creek up the same to

its intersection with the boundary line of the first tract described in deed from the grantor herein to Joseph G. Tyler, of even date herewith; thence North to corner a rock on west bank of Spring Branch at its confluence with said creek; thence North 26½ degrees West 34 chains and 22 links to corner, a rock in center of said public road; thence following the meanders of said road as follows; North 58½ degrees East 8 chains; thence North 32 degrees East 5 chains 50 links; thence North 63 degrees East 3 chains 50 links to West Bank of Little Femme Osage Creek; thence North 28 degrees East 85 links to Elm tree 15 inches in diameter on opposite side of said creek; thence same course (North 28 degrees East) 4 chains 15 links; thence North 73 degrees East 9 chains; thence South 65¾ degrees East 9 chains; thence North 74¾ degrees East 6 chains 50 links; thence North 37½ degrees East 3 chains; thence South 59 degrees East 9 chains; thence South 80 degrees East 5 chains; thence North 77 degrees East 3 chains; thence North 63½ degrees East 6 chains 14 links; to corner a rock in said Road, the place of beginning, this land situated in St. Charles County, Missouri, and containing 160 acres, more or less.

That plaintiffs said motion for judgment should be sustained in part but should be denied in so far as plaintiff thereby seeks to avoid the payment of any interest as a part of the just compensation required to be paid by it for the taking and appropriation of said land.

That the aforesaid countermotion should be sustained to the extent that defendant seeks to have judgment entered fixing the compensation to be paid by plaintiff for the taking of said land at $34,000.00, plus interest at 6% per annum on the sum of $18,000.00 from June 18th, 1941 until the date on which said sum was paid into the regis-
[fol. 72] try of this court, to-wit, May 17th, 1945, and to have said interest added as a part of the just compensation to which defendants are entitled, and to have said sum paid into the registry of this court in addition to the amounts already paid into said registry.

It Is Therefore, Ordered, Adjudged and Decreed by the Court that

(1) Plaintiff, United States of America, by virtue of this proceeding is awarded judgment in condemnation against the said land in plaintiffs petition and hereinabove described, for the purposes herein defined and specified and against the defendants herein, and each and all of them, jointly and severally, as their title and rights may appear. And that the title in fee simple to said premises, subject to all existing highways and public utility easements but including the fee underlying such existing easements, is vested in the plaintiff, United States of America, and has been vested in plaintiff, United States of America, since the filing of said declaration of taking, and the defendants, and each and all of them, jointly and severally, are divested of any and all right, title, interest and claim of every kind and description in or to the land above described.

(2) That in accordance with the option contract, hereinbefore referred to, the agreed value or worth of said land as of the date of the filing of said declaration of taking herein, is hereby fixed at the sum of $34,000.00, plus interest on $18,000.00 of said sum at the rate of 6% per annum from the 18th day of June 1941 until the 17th day of May, 1945 as the full just compensation to which the owners of said land are entitled in this cause for the taking and appropriation of said land by plaintiff.

(3) That plaintiff shall forthwith pay into the registry of this court the sum of $4,230.00, being the amount of interest at the rate of 6% per annum on said sum of $18,000.00 from the 18th day of June, 1941 to the 17th day of May, 1945 as that part of the just compensation which the owners of the land hereinabove described are entitled to for the taking and appropriation thereof by plaintiff and which has not been heretofore deposited in the registry of this court by plaintiff, which sum of $4,230.00, together with said sum of $34,000.00, heretofore deposited by plaintiff in the registry of this court, shall [fol. 73] repose in the registry of this court for the use and benefit of the owners of said land and all others, if any, who may claim and be entitled to an interest therein by and through said owners, and for disposition in the manner and proportion as this court shall hereafter order, adjudge and decree.

(4) That this cause shall be held open for entry of such other and further orders and decrees as may be meet and just in the premises.

Dated this 2nd day of July, 1945.

GEO. H. MOORE, Judge.

Endorsed; Filed July 1, 1945, Jas. J. O'Connor, Clerk.

[fol. 74] (Motion of Plaintiff for New Trial.)

(Filed July 7, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial for the following reasons:

1. The Court erred in holding that this is an adversary condemnation proceeding;

2. The Court erred in not holding that this is a friendly condemnation proceeding according to the terms and provisions of the option-contract;

3. The Court erred in not holding that the filing of the equitable answer by the property owners converted this condemnation proceeding into an equitable action for the enforcement of the option-contract;

4. The Court erred in holding that this condemnation proceeding differs in no respect from any other condemnation proceeding except in the method of ascertaining the value of the land;

5. The Court erred in not holding that the equitable answer filed by the property owners in this case and the decision of the Supreme Court of the United States upholding the validity of the option-contract and the allegations of the equitable answer took the case out of the operation of the Declaration of Taking part of this condemnation proceeding;

[fol. 75] 6. The Court erred in holding that there was an ascertainment of the value of the land in this proceeding, for it has never been ascertained by this Court nor by any Appellate Court;

7. The Court erred in not holding that the compensation was not ascertained in this proceeding but that on the contrary it was fixed by the option-contract and the opinion of the Supreme Court of the United States holding such option-contract to be valid and binding upon the plaintiff;

8. The Court erred in its construction of the option-contract;

9. The Court erred in holding that the amount mentioned in the option-contract was the fair market value of the land involved in this case at the time of the filing of the Declaration of Taking in this case;

10. The Court erred in not holding that the sum mentioned in the option-contract is the full compensation to which the property owners are entitled in this proceeding;

11. The Court erred in its definition as to what constitutes just compensation;

12. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty to be paid by the plaintiff for its failure to perform the conditions of the option-contract immediately after its acceptance by the Government;

13. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty against the Government for litigating the validity of the option-contract;

14. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty for the Government's delay in the payment of the amount mentioned in the option-contract when such delay was caused by the vigilance and diligence of plaintiff's Officers and Attorneys in litigating the validity of the option-contract, and with the acquiescence of the defendant property owners;

[fol. 76] 15. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty without citing some statute authorizing such penalty;

16. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to promptly perform and fulfill the provisions and conditions of the option-contract;

17. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to fully and completely perform and fulfill the provisions and conditions of the option-contract;

18. The Court erred in its construction of the opinion of the Supreme Court of the United States in theAndrews and Muschany cases;

19. The Court erred in not holding that the Supreme Court of the United States held that the amount mentioned in the option-contract was full and complete compensation when the Supreme Court said:

"The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this offer, agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses. . . . . The Government knew the total cost when it became bound on the contract." (emphasis added)

20. The Court erred in holding that the burden of proof is upon the Government to show the absence of any contract obligation to pay interest or any statute providing for interest;

21. The Court erred in not holding that the burden of proof is upon the property owners to point out the exact provision of the contract providing for interest or to point out the exact provision of the statute providing for interest and a full compliance by the property owners with such statute;

[fol. 77] 22. The Court erred in allowing interest upon any part of the amount mentioned in the option-contract and for any period of time;

23. The decision of the judgment now entered is contrary to the views of the Court when the question of the

option was first presented to the Court in the Muschany and Andrews cases when the District Courts held in the Findings of Fact and Conclusions of Law that the property owners were entitled to recover only the principal amount named in the option without interest;

24. That as the Supreme Court, the Court of Appeals and the District Court all held in passing on the McDowell option that the amount included therein included not only the value of the land but compensation to the title company, compensation to McDowell by way of commission, and other expenses, to now allow interest on the entire sum to the property owner would be to allow him interest on not only the value of his land but also on other items which do not belong to him, but which, in truth and in fact, are being paid by the Government and not by the property owners to the title company and to McDowell;

25. That by including all of these elements in the amount named in the option, as well as the value of the land, the parties conclusively show that they were considering the amount of the option to be the total and entire amount to be paid by the Government as full compensation for the land and the other elements named therein, and further show that it was the intention of the parties that that amount and no additions thereto by way of interest was to be paid by the Government;

26. That the Court erred in holding that the amount named in the option represented the value of the land in view of the holding of the Supreme Court that it did not represent that amount at all, but that it represented the agreed purchase price, and in view of the fact that the option contract itself repeatedly refers to it as the agreed purchase price and not value;

27. That the position of the land owners in asking for interest under the Declaration of Taking Statute is inconsistent with their prior position heretofore asserted that they were entitled to have the option contract enforced as an option contract and that said contract not calling for interest, having failed to provide for the payment of interest, does not now entitle the landowners to interest in addition to the principal amount named therein;

28. The Court erred in finding that, upon the acceptance by the plaintiff of the said option-contract the possession of the land involved herein was taken by, and has ever since been in the plaintiff, the United States of America, because there was no evidence to sustain the said finding of fact;

29. The Court erred in not holding that the right to immediate possession of the land was included in the consideration mentioned in the option-contract and that such right of immediate possession was contracted for in the said option-contract and that the payment of the consideration mentioned in the option-contract is full payment for the land herein involved and for the right to immediate possession thereof obtained by the plaintiff under such option-contract;

30. The Court erred in holding that there was a taking under the Declaration of Taking filed in this cause such as contemplated by the Declaration of Taking Statute because the right to possession of the property had theretofore been contracted for under the terms and provisions of the option-contract;

31. The Court erred in holding that the property owners are entitled to interest under the provisions of the Declaration of Taking Statute because there was no taking under the Declaration of Taking which could authorize the allowance of interest under such statute;

[fol. 79] 32. The Court erred in holding that there was an ascertainment of just compensation in this proceeding, such as is mentioned and contemplated in the Declaration of Taking Statute, in order to warrant the inclusion, as part of the just compensation awarded, of interest at the rate of 6% per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment, or upon such part of the amount finally awarded as was not deposited contemporaneously with the Declaration of Taking;

33. The Court erred in holding that the two deposits made in this case, the first with the Declaration of Taking and the second on May 17, 1945 were erroneous and insufficient in that they failed to include any interest;

34. The Court erred in its judgment and decree entered in this cause by adding interest at the rate of 6% per annum upon the deficiency or upon the difference between the amount deposited with the Declaration of Taking and the amount mentioned in the option-contract;

35. The Court erred in its judgment and decree entered in this cause by including interest at the rate of 6% per annum from the date of the Declaration of Taking in this cause to May 17, 1945 upon the amount deposited in the Registry of this Court on the said 17th day of May, 1945;

36. The Court erred in its judgment and decree entered in this cause by requiring the plaintiff to pay into the Registry of the Court forthwith a sum of money equivalent to 6% interest on the sum deposited in the Registry of this Court on May 17, 1945 from the date of the Declaration of Taking in this case to the date of said deposit on May 17, 1945 as a part of the just compensation to which the defendants are entitled for the taking of the lands involved in this cause;

[fol. 80] 37. The Court erred in its findings and in its judgment and decree in the computation of the amount of the interest adjudged to the defendants upon the deficiency from the date of the Declaration of Taking to May 17, 1945;

38. The Findings and Judgment entered in this cause are contrary to and against the evidence under the law, are contrary to and against the law under the evidence and are contrary to and against the law and the evidence;

Wherefore, Plaintiff moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial herein.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 7th day of July, 1945.

[fol. 80a] (Docket Entry of Submission and Overruling of Motion of Plaintiff for New Trial.)

November 27, 1945.

Motion of plaintiff for a new trial submitted by plaintiff, taken as submitted by defts. and overruled.

[fol. 81] Statement of Points to be Relied Upon on Appeal.

(Filed December 7, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 987. vs. At Law.
160 Acres of land, more or less, situate in St. Charles County, State of Missouri, known as Tract No. 11-A, and Edward J. Linnenbringer, et al., Defendants.

The United States of America, appellant in the above-entitled case, states that the following points will be relied upon on the appeal:

1. The District Court erred in denying the plaintiff's Motion for Judgment Fixing Compensation in the Amount of the Option Contract Price, without interest.

2. The District Court erred in entering judgment with interest on $18,000.00, the difference between $34,000.00, the amount of the option contract price, and $16,000.00, the sum deposited with the Declaration of Taking, from June 18, 1941, the date of the filing of the Declaration of Taking, to May 17, 1945, the date of the deposit in Court of such difference.

3. The District Court erred in overruling plaintiff's motion for a new trial.

Respectfully submitted,

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant U. S. Attorney.

Copy mailed to opposing counsel this 7th day of December, 1945.

HARRY C. BLANTON,
U. S. Attorney.

[fol. 82] Designation of the Record on Appeal.

(Filed December 7, 1945.)

United States of America, Appellant in the above entitled cause, designates for inclusion in the Transcript of the Record on Appeal the pleadings, proceedings and evidence as follows:

	Filed
(1) Petition in Condemnation as amended October 9, 1941 and June 1, 1942	June 18, 1941
(2) Declaration of Taking in Cause No. 979, omitting therefrom all names from the caption except the defendant Edward J. Linnenbringer and omitting from the paragraph describing the parcels of land in said Declaration all parcels except Tract No. 11-A	June 16, 1941
(3) Order and Judgment vesting title in Plaintiff as to Tract No. 11-A and Order of Immediate Possession	June 18, 1941
(4) Order directing the transfer of the sum of $16,000.00 from Cause No. 979 to this cause for the use and benefit of the defendants in this cause	June 18, 1941
(5) Answer of defendants Edward J. Linnenbringer and Emma Linnenbringer to Plaintiff's petition	July 23, 1941

(6) Answer of defendant Elroy H. Linnenbringer to Plaintiff's petition — July 29, 1941

(7) Motion of Plaintiff for Judgment in Condemnation and Judgment for defendants fixing compensation by option-contract — April 6, 1945

[fol. 83]

(8) Order setting for hearing on May 7, 1945 the Motion of Plaintiff for Judgment in Condemnation — April 6, 1945

(9) Answer of defendants to Plaintiff's Motion for judgment in condemnation and fixing compensation by option-contract and Motion of defendants for Judgment — April 26, 1945

(10) Receipt of the Clerk for $18,000.00 paid into the Registry of the Court — May 17, 1945

(11) Memorandum Opinion of the Court finding issues in favor of defendants and against the Plaintiff — June 8, 1945

(12) Findings and Judgment — July 2, 1945

(13) Plaintiff's motion for New Trial — July 7, 1945

(14) Docket entry of November 21, 1945 overruling Plaintiff's Motion for a new trial

(15) Plaintiff's Notice of Appeal — November 23, 1945

(16) Appellant's Statement of Points

(17) Clerk's docket entries

(18) This designation of the record

(19) All other pleadings and documents filed in connection with this appeal.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

Copy mailed to opposing counsel this 7th day of December, 1945.

HARRY C. BLANTON,
United States Attorney.

[fol. 84] Clerk's Certificate.

United States of America,
Eastern Division of the
Eastern Judicial District
of Missouri.—ss.:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify the above and foregoing to be a full, true and complete transcript (except in so far as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in case No. 987, wherein the United States of America is plaintiff-appellant and 160 Acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 11-A, and Edward J. Linnenbringer, et al., are defendants-appellees, as fully as the same remains on file and of record in my office.

Seal
U. S. Dist. Court
East. Div. of the
East. Jud. Dist. of
Missouri

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, State of Missouri, this 21st day of December, in the year of our Lord, Nineteen Hundred and Forty-five.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.
By John J. Jarvis,
Deputy Clerk.

Filed Dec. 21, 1945. E. E. Koch, Clerk.

[fol. 1] Notice of Appeal.

(Filed November 23, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 997. vs. At Law.
215.494 Acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al.. Defendants.

Notice is hereby given that the United States of America, Plaintiff in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final Judgment entered in this cause on the 30th day of June, 1945.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 23rd day of November, 1945.

[fol. 2] Docket entry showing filing of notice of appeal and mailing copy of such notice to attorney for defendant.

(November 23, 1945.)

Notice of appeal of plaintiff to the United States Circuit Court of Appeals, 8th Circuit from final judgment entered herein June 30, 1945, filed by United States Attorney, and copy of aforesaid notice forthwith mailed by the Clerk of the Court to William H. Allen, Esq., atty. of record for defts. Dennis B. Pitman, et al.

[fol. 3] Clerk's Docket Entries of Case No. 997.)

United States Of America, Plaintiff,
Docket No. 997. vs. At Law.
215.494 Acres of land, more or less, situate in St. Charles County, State Of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al., Defendants.

6-19-41 Motion of plaintiff for leave to file petition in condemnation, for issuance of summons, etc., filed, presented and granted in order filed and entered; petition in condemnation filed and summons issued directed to defendants, returnable August 4, 1941; on oral motion of U. S. Attorney, order and judgment filed and entered on Declaration of Taking filed in Cause No. 979 on June 16, 1941, vesting fee simple title in plaintiff as to lands sought to be condemned herein and providing for immediate delivery of possession to plaintiff; order filed and entered directing notice be given defendants of judgment herein on Declaration of Taking and of requirements for delivery of possession to plaintiff; order filed and entered directing transfer of the sum of $14,600 of fund deposited in Registry under Declaration of Taking filed in Cause 979 to the use and benefit of persons entitled thereto as to Tract No. 18-A, herein.

7-29-41 Order filed and entered continuing cause to September 15, 1941.

8- 4-41 Upon oral application, defendant Dennis B. Pitman granted 30 days from and after August 4, 1941, within which to answer herein.

8- 4-41 Order filed and entered continuing cause to September 15, 1941.

8- 4-41 Marshal's Return as to service of summons filed (Executed)

9- 3-41 Separate answer of defendants Dennis B. and May Dell Pitman to plaintiff's petition filed.

9- 6-41 Motion of plaintiff for leave to amend petition by dismissing as to defendant George J. Chris-

tisen and to correct the name of certain defendant to read "S. Brooks Remington" and for issuance of summons to such defendant, returnable September 25, 1941, filed and presented, and granted in order filed and entered.

9-15-41 On motion of U. S. Attorney, order filed and entered continuing case to September 25, 1941. Division No. 1

9-25-41 On motion of U. S. Attorney, order filed and entered continuing cause to October 14, 1941.

9-25-41 Marshal's Return of service to summons filed (Executed)

9- 3-41 Separate answer of defendants Dennis B. and May Dell Pitman to plaintiff's petition filed.

9- 6-41 Motion of plaintiff for leave to amend petition by dismissing as to defendant George J. Christisen and to correct the name of certain defendant to read "S. Brooks Remington" and for issuance of summons to such defendant, returnable September 25, 1941, filed and presented, and granted in order filed and entered.

9-15-41 On motion of U. S. Attorney, order filed and entered continuing case to September 25, 1941. Division No. 1.

9-25-41 On motion of U. S. Attorney, order filed and entered continuing cause to October 14, 1941.

9-25-41 Marshal's Return of service to summons filed (Executed)

[fol. 4] 10-14-41 On oral motion of U. S. Attorney order filed and entered continuing case to January 7, 1942.

10-20-41 On motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition relative to land description etc., and to amend court records as to caption of cause relative to acreage of land sought to be condemned, herein.

1- 7-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to March 9, 1942.

3- 9-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to June 9, 1942.

6- 9-42 Upon oral motion of U. S. Attorney, order filed and entered continuing cause to September 9, 1942.

9- 9-42 On oral motion of U. S. Attorney, order filed and entered continuing case to December 9, 1942.

10- 7-42 On motion of plaintiff filed and presented, order filed and entered directing all parties having or claiming any interest in and to award as to Tract No. 18-A to file intervening petitions setting up their respective claims by October 21, 1942 and setting such petitions so filed for hearing on October 23, 1942.

10- 8-42 Affidavit as to mailing of notice to defendants to file intervening petitions for amount deposited by plaintiff in Registry under Declaration of Taking, and of date set for hearing same, filed by plaintiff.

10-20-42 Clerk's Return to posted notice filed.

10-23-42 On stipulation between plaintiff and defendants, Dennis B. Pitman, et al., filed and presented, order for provisional disbursement from Registry of estimated compensation herein filed and entered.

12- 7-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to January 14, 1943.

1-14-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to April 14, 1943.

4-14-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to October 14, 1943.

10-14-43 On oral motion of U. S. Attorney, order filed and entered continuing cause to February 14, 1944.

2-14-44 On oral motion of U. S. Attorney, order filed continuing cause to May 15, 1944.

5-15-44 On oral motion of U. S. Attorney, order filed continuing cause to Nov. 4, 1944.

[fol. 5] 11- 4-44 On oral motion of U. S. Attorney, order filed continuing cause to Feb. 5, 1945.

2- 5-45 On oral motion of U. S. Attorney, order filed continuing cause to May 3, 1945.

4-17-45 Claim of plaintiff in its own behalf and for Collector of Internal Revenue for Sixth Collection District of Missouri asserted by reason of certain lien, interest and penalties thereon against any disbursement herein from Registry awarded to R. Newton McDowell, filed.

4-17-45 Motion of plaintiff for judgment in condemnation and for defendants fixing compensation by option filed and order thereon filed and entered setting said motion for hearing on May 7, 1945; vacating order heretofore entered continuing cause to May 3, 1945, and directing plaintiff give notice of hearing on aforesaid motion by mail to defendants, their attorneys, and R. Newton McDowell and The Kansas City Title Insurance Company, and by posting notice thereof, etc.

4-19-45 Affidavit as to mailing of notice to defendants, their attorneys and other parties in interest of hearing on motion of plaintiff for judgment in condemnation and for defendants fixing compensation by option, filed by plaintiff.

4-30-45 Clerk's return to posted notice filed.

5- 4-45 Answer of defendants Dennis B. Pitman, et al., to plaintiff's motion for judgment in condemnation and fixing compensation by option, and motion of said defendant for judgment with interest filed.

5- 5-45 Claim of intervening defendant Kansas City Title Insurance Company filed.

5- 7-45 Motion of plaintiff for judgment for plaintiff in condemnation and for defendant fixing compensation by option and on responsive pleadings thereto and counter motions of defendants for payment of interest submitted. Defendants desiring to submit briefs granted 10 days and Government ten days thereafter to submit answering brief.

5-17-45 Plaintiff tenders into Court to the use and benefit of persons entitled thereto, deficiency in the sum of $20,400.00 which sum is deposited by the Clerk in the Registry.

6- 8-45 Memorandum opinion of the Court filed finding issues in favor of defendants and against plaintiff, directing appropriate judgment be submitted respecting the payment of interest, and fully directing counsel to submit orders ruling on various motions and counter-motions, all in accordance with said opinion, for approval, signature and entry, excepting cases Nos. 807 and 874, known as Muschany and Andrews Cases.

[fol. 6] 6- 8-45 Supplemental claim of U. S. of A. filed.

6-30-45 Findings and judgment filed and entered awarding plaintiff judgment in condemnation and defendants judgment fixing compensation by option, with interest, etc.

7- 7-45 Motion of plaintiff for new trial filed.

8-10-45 Amended claim of the United States of America, filed.

8-24-45 Motion of Reconstruction Finance Corporation to intervene, together with proposed intervening petition, filed.

8-29-45 Order of Hon. Geo. H. Moore, received, filed and entered, fixing September 18, 1945 as the time for defendants to file intervening petitions herein and setting such intervening petitions for hearing on September 21, 1945.

9- 7-45 Affidavit as to mailing of notice to defendants to file intervening petitions for distribution of sum on deposit in Registry and of date set for hearing same, filed by plaintiff.

9-17-45 Petition of defendants Dennis B. and May Dell Pitman for distribution of sum on deposit in Registry, filed.

9-17-45 Claim of R. Newton McDowell, filed.

9-17-45 On oral motion of U. S. Attorney, order filed continuing cause from September 21, 1945 to September 28, 1945.

9-17-45 Intervening petition of Blatchford Downing as Assignee-Pledgee of R. Newton McDowell filed.

9-17-45 Motion to intervene and proposed intervening petition thereto attached of National Refining Company, together with affidavit as to service of aforesaid motion and proposed intervening petition by movant upon parties in interest, filed.

9-18-45 Clerk's Return to posted notice filed.

9-28-45 Stipulation between defendant-[landonwers] Dennis B. Pitman, et al., and R. Newton McDowell and Blatchford Downing, as assignee of McDowell, whereby defendants assign to said McDowell 5% of funds deposited in Registry and agree such sum be distributed to McDowell or any person claiming under him as may be directed by the Court, in consideration whereof McDowell releases, etc., said defendants from all claims under contract mentioned in pleadings filed.

Claim of Kansas City Title Insurance Company heard, submitted and allowed. Claim of McDowell submitted and allowed in accordance with aforesaid stipulation. Cause submitted for distribution.

[fol. 7] 9-28-45 Separate motions of Reconstruction Finance Corporation, et al., for leave to intervene submitted on briefs to be hereafter present-

ed; movants granted one week to submit brief, government ten days thereafter in which to submit answering brief and movant Reconstruction Finance Corporation one week thereafter to submit reply brief.

10-23-45 Order of distribution filed and entered.

11-21-45 Motion of plaintiff for a new trial submitted by plaintiff, taken as submitted by defendants and overruled.

November 23—Notice of appeal of plaintiff to the United States Circuit Court of Appeals, 8th Circuit from final judgment entered herein June 30, 1945, filed by United States Attorney, and copy of aforesaid notice forthwith mailed by the Clerk of the Court to William H. Allen, Esq., atty. of record for defendants, Dennis B. Pitman, et al.

December 7—Appellant's designation of record and (2) statements of points to be relied upon on appeal, filed.

December 11—Affidavit as to mailing to Theodore Bruere, attorney copies of pltff's designation of record on appeal and statement of points to be relied upon on appeal, filed by United States Attorney.

[fol. 8] Petition in Condemnation.

(Filed June 19, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 997. vs. At Law.

Order 10-20-41 215.494

248.824 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known as Tract No. 18-A, and

Dennis B. Pitman

May Dell Pitman, wife of Dennis B. Pitman

John Paul, Trustee

The Bank Of Dutzow, a corporation

John Salfen, Tenant

~~George J. Christison~~

~~S. Brooks Pennington~~ } S. Brooks Remington

Collector Of Revenue Of St. Charles County, Missouri

County Of St. Charles, State Of Missouri

~~All Other Unknown Owners of all that tract of land situate in St. Charles County, State of Missouri, Known as Tract No. 18-A, and more particularly described herein; Defendants.~~

Order 9-6-41

Order 10-20-41

Tract No. 18-A.

[fol. 9] To The Honorable, The Judges Of The United States District Court For The Eastern District Of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and A. G. Edwards, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Secretary of War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized and empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in fee simple absolute of the land hereinafter described and the title thereto, which real estate is located as aforesaid, and is authorized and directed to be brought by the Secre- [fol. 10] tary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257; and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940, (Public No. 667—76th Congress); and the Act of Congress approved September 21, 1940, (Publ. Res. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United States, and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

[fol. 11] (A)

Tract No. 18 A containing 248.824 acres of land, more or less, situate in St. Charles County, Missouri, and more particularly described as follows:

Parcel 1

A tract of land in Sections 24 and 19, Township 45 North, Ranges 2 East and 3 East, containing 30 acres, more or less, being part of Lot No. 3 as designated and described in the agreed partition of the real estate of James F. Howell, deceased, dated March 29, 1854, and recorded in Book "B" No. 2, pages 450 and following, of Recorder's Office, St. Charles County, Mo., being the remaining portion of said Lot No. 3 after deducting the public road which runs through said Lot No. 3, and 40 acres off the West side thereof conveyed to H. B. Castlio and Mitchell Castlio as per deeds recorded in Book 45, page 209 and Book 38, page 108, and 50 acres conveyed to Boyd Keitel by Dennis B. Pitman as per deed recorded in Book 179, Page 65, said 30 acre tract being more particularly described as follows: Beginning at the northeastermost corner of said Lot No. 3, a point; thence South 7½ degrees West 16.80 chains; thence North 82½ degrees West 18.00 chains; thence North 7½ degrees East 16.80 chains; thence South 82½ degrees East 18.00 chains to the point of beginning, said land being situated in St. Charles County, Missouri, and containing 30.0 acres, more or less.

Parcel 2.

Order 10-20-41

fractional

All of the ^ NE¼ of Section 36, Township 46 North, Range 2 East, lying West of the West line of U. S. Survey 1798, excepting therefrom a tract of land containing 11.58 acres in the Northwest corner thereof described as beginning at the Northwest corner of the NE¼ of said Section 36, thence East 10.94 chains; thence South 10.36 chains; thence West 10.94 chains; thence North 10.36 chains to the point of beginning; said tract containing 73.03 acres, more or less.

Order 10-20-41

Parcel 3.

Also part of U. S. Survey No. 1798, in Township 46, North, Range 2 and 3 East, bounded and more particularly described as follows: Beginning at a rock in the West line of said Survey 1798, which is South 7½ degrees West 35.00 chains from the Northwest corner of said Survey, thence South 82½ degrees East 19.05 chains to corner, a rock, thence South 7½ degrees West 17.41⅔ chains to corner a rock; thence North 82½ degrees West 19.05 chains to point on West line of Survey 1798, thence along said West line of Survey 1798 North 7½ degrees East 17.50 chains to place of beginning, containing 33⅓ acres, more or less.

Parcel 4.

A tract of land located in the Keitel tract of Lot No. 3 between the Francis Howell Cemetery and the Pitman road in U. S. Survey No. 887, being more particularly described as follows: Beginning at the Southeast corner of the Francis Howell Cemetery; thence East 75 feet to the West line of the Pitman road; thence North along said line a distance of 84 feet to a point; thence West 75 feet to the East line of said Cemetery; thence South along said line 84 feet to the point of beginning, said land being located in St. Charles County, Missouri, and containing .144 acres, more or less.

[fol. 12]

Amended description
Case No. 997, Tract No. 18-A

Order 10-20-41

Parcel 5.

A tract of land containing 9.67 acres, being part of the W½ of the NW¼ of Section 6, Township 45 North, Range 3 East, more particularly described as follows to-wit: Beginning in the South line of the Marthasville Road at a rock in the Township line, which rock is distant East 4.38 Chains from another rock in the South line of said road set in the Range line at or near, the Northwest corner of said Section 6, Township 45 North, Range 3 East; thence from said beginning point South 3 degrees 30 minutes East along the land once of J. L. Schenningmann 40.82 chains to the East and West middle line of Section

6, an old stone in said line, from which a Black Walnut bears North 33¼, West 32 links and a Hickory 8 inches in diameter bears South 89, East 39 links; thence with said line of said Section West 2.37½ chains to a stake; thence North 3 degrees 30 minutes West parallel with the first course along the land once of Edw. Berghaus 40.82 chains to a stake in the South line of the Marthasville road; thence East with the south line of said road 2.37½ Chains to the point of beginning, containing 9.67 acres.

Parcel 6.

Part of the Southwest fractional quarter of Section 27, Township 46 North, Range 2 East, bounded and more particularly described as follows: Beginning at the southwest corner of said Section 27, a rock, from which a black oak 16 inches in diameter bears South 54 degrees West distant 29 links and a white oak 8 inches in diameter bears North 85 degrees West distant 25 links; thence North along the West line of said section 17 chains 90 links to corner, a rock, from which a black oak 12 inches in diameter bears North 30 degrees East distant 17 links and a white oak 4 inches in diameter bears South 13 degrees East distant 22 links; thence South 40¾ degrees East along the land once of Hy Boerding 24 chains 9 links to corner, a rock, on the section line between Sections 27 and 34 of said township and range; thence West 16 chains to the place of beginning, containing 14.32 acres, more or less, and being the same tract of land conveyed by John W. Callison and wife to Nancy E. Callison as per Warranty Deed dated August 3, 1926, and recorded in the Recorder's Office in Book 154 at Page 332.

Parcel 7.

A tract of land situated in U. S. Survey No. 1641, Township 46 North, Range 2 East, described as follows: Beginning at a point in the center of Dardenne Creek distant North 80 degrees 09 minutes East 13.40 chains and North 9 degrees 14 minutes West 21.37 chains from the most northeasterly corner of U. S. Survey No. 280; thence along the land once of Julia Castlio South 9 degrees 14 minutes East 21.37 chains to a stone in the southern line

of said U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 230; thence along the southern line of said U. S. Survey No. 1641 North 80 degrees 09 minutes East 21.73 chains to an old stone; thence North 9 degrees 00 minutes West along the land once of Schneider 5.75 chains to a point in the center line of Dardenne Creek; thence northwestwardly along the center line of Dardenne Creek, as now located, to the place of beginning, containing 35 acres, more or less.

[fol. 13] Tract No. 18 A

Parcel 5.

A tract of land containing 9.67 acres, being part of the W½ of the NW¼ of Section 6, Township 45 North, Range 3 East, more particularly described as follows, to-wit: Beginning in the South line of the Marthasville Road at a rock in the Township line, which rock is distant East 4.38 Chains from another rock in the South line of said road set in the Range line, at or near, the Northwest corner of said Section 6, Township 45 North, Range 3 East; thence from said beginning point South 3 degrees 30 minutes East 40.82 chains to the East and West middle line of Section 6, an old stone in said line, from which a Black Walnut bears North 33¼, West 32 links and a Hickory 8 inches in diameter bears South 89, East 39 links; thence with said line of said Section West 2.37½ chains to a stake; thence North 3 degrees 30 minutes West parallel with the first course 40.82 chains to a stake in the South line of the Marthasville road; thence East with the South line of said road 2.37½ Chains to the point of beginning, containing 9.67 acres.

Parcel 6.

Part of the Southwest fractional quarter of Section 27, Township 46 North, Range 2 East, bounded and more particularly described as follows: Beginning at the southwest corner of said Section 27, a rock, from which a black oak 16 inches in diameter bears South 54 degrees West distant 29 links and a white oak 8 inches in diameter bears North 85 degrees West distant 25 links; thence North 17 chains 90 links to corner, a rock, from which a

black oak 12 inches in diameter bears North 30 degrees East distant 17 links and a white oak 4 inches in diameter bears South 13 degrees East distant 22 links; thence South 40¾ degrees East 24 chains 9 links to corner, a rock, on the section line between Sections 27 and 34 of said township and range; thence West 16 chains to the place of beginning, containing 14.32 acres, more or less, and being the same tract of land conveyed by John W. Callison and wife to Nancy E. Callison as per Warranty Deed dated August 3, 1926, and recorded in the Recorder's Office in Book 154 at Page 332.

Parcel 7.

A tract of land situated in U. S. Survey No. 1641, Township 46 North, Range 2, East, described as follows: Beginning at a point in the center of Dardenne Creek distant North 80 degrees 09 minutes East 13.40 chains and North 9 degrees 14 minutes West 21.37 chains from the most northeasterly corner of U. S. Survey No. 280; thence along the western line of said tract South 9 degrees 14 minutes East 21.37 chains to a stone in the southern line of said U. S. Survey No. 1641 which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280; thence along the southern line of said U. S. Survey No. 1641 North 80 degrees 09 minutes East 21.73 chains to an old stone; thence North 9 degrees 00 minutes West 5.75 chains to a point in the center line of Dardenne Creek; thence northwestwardly along the center line of Dardenne Creek, as now located, to the place of beginning, containing 35 acres, more or less.

[fol. 14]

Amended description
Case No. 997, Tract No. 18-A

Order 10-20-41

A tract of land situated in fractional Section 24, Township 46 North, Range 2 East, described as follows: Beginning at a stone in the Southern line of U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280 and from which stone a Black Walnut 30 inches bears North 9 degree 00 minutes West 51½ links;

thence South 9 degrees 14 minutes East along the land once of O. W. Fosher 10.80 chains to an iron rod; thence North 80 degrees 09 minutes East along the land once of O. W. Fosher 17.62 chains to the center line of the former Pitman private road, 16 feet wide; thence North 0 degrees 19 minutes East 11.18 chains to a stone in the southern line of U. S. Survey No. 1641; thence along said Survey line South 80 degrees 09 minutes West 19.44 chains to the place of beginning, containing 20 acres.

All of the above described land being situated in St. Charles County, Missouri, and containing in all 215.494 acres, more or less.

Subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 15] Tract No. 18 A

A tract of land situated in fractional Section 24, Township 46 North, Range 2, East, described as follows: Beginning at a stone in the Southern line of U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280 and from which stone a Black Walnut 30 inches bears North 9 degrees 00 minutes West 51½ links; thence South 9 degrees 14 minutes East 10.80 chains to an iron rod; thence North 80 degrees 09 minutes East 17.62 chains to the center line of the former Pitman private road, 16 feet wide; thence North 0 degrees 19 minutes East 11.18 chains to a stone in the southern line of U. S. Survey No. 1641; thence along said Survey line South 80 degrees 09 minutes West 19.44 chains to the place of beginning, containing 20 acres.

All of the above described land being situated in St. Charles County, Missouri, and containing in all 248.824 acres, more or less.

Subject to all existing highway and public utility easements but including the fee underlying such existing easements.

[fol. 16] (B)

That the following defendants own or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

Dennis B. Pitman

May Dell Pitman, wife of Dennis B. Pitman

John Paul, Trustee

The Bank of Dutzow, a corporation

John Salfen, Tenant

~~George J. Christisen~~

~~A. Brooks Pennington~~ A. Brooks Remington

Order 9-6-41

[fol. 17] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Collector of Revenue of St. Charles County, Missouri, are, therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands, each claim and assert, or may claim and assert a reversionary interest in and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, aliences, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and

claimants to easements in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendant, as hereinabove specifically named, if known, and if unknown such unknown persons by the description of the "Unknown Owners" of the land herein described and to be condemned, to the end that they may come into court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

Eleventh: That your petitioner has attempted to set forth the interest or estates of all persons, firms and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporation having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that all of their rights, title, interests and estate, whatever it may be, to all and [fol. 18] singular, the premises above mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident defendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value

of the property proposed to be taken and other damages which may be sustained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts [appropos] to this proceeding and the provisions of the law applicable thereto, under which this action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants, that the Court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that these defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court, upon the filing of this petition, will make an order pursuant to the Act of Congress [fol. 19] approved February 26, 1931. (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servants, agents and employees, may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interests therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief

in the premises to which this petitioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney for the
Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri.

A. G. EDWARDS,
Special Assistant to the
United States Attorney,
410 New Federal Building,
St. Louis, Missouri.

[fol. 20] United States of America,
Eastern District of Missouri—ss.:

Before me, the undersigned, personally appeared Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the petition.

HARRY C. BLANTON.

Subscribed and sworn to before me, this 19th day of June, 1941.

JAMES J. O'CONNOR,
Clerk of U. S. District Court in and
for the Eastern District of Missouri.
By Harold G. Pryce, Deputy.

(Seal)

[fol. 21] Declaration of Taking.

(Filed June 16, 1941.)

In The United States District Court In And For The Eastern District Of Missouri.

United States Of America, Petitioner,
Case No. 979. vs.
1,453.50 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, And Mary Schneider, Et Al., Defendants.

To The Honorable, The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U.S.C. sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act of Congress approved April 5, 1941 (Public Law 29 —77th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for other uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

[fol. 22] 2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject, however, to existing rights for easements for public utilities.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the

persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 13th day of June, A. D. 1941, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

[fol. 23] Schedule "A".

The land which is the subject matter of this Declaration of Taking and of this condemnation aggregates 1,453.50 acres, more or less, situate and being in the County of St. Charles, State of Missouri. A description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

[fol. 24] Tract No. 18-A.

Description:

Parcel 1

A tract of land in Sections 24 and 19, Township 45 North, Ranges 2 East and 3 East, containing 30 acres, more or less, being part of Lot No. 3 as designated and described in the agreed partition of the real estate of James F. Howell, deceased, dated March 29, 1854, and recorded in Book "B" No. 2, pages 450 and following, of Recorder's Office, St. Charles County, Mo., being the remaining portion of said Lot No. 3 after deducting the public road which runs through said Lot No. 3, and 40 acres off the West side thereof conveyed to H. B. Castlio and Mitchell Castlio as per deeds recorded in Book 45, page 209 and Book 38, page 108, and 50 acres conveyed to Boyd Keitel by Dennis B. Pitman as per deed recorded in Book 179, Page 65, said 30 acre tract being more particularly described as follows: Beginning at the northeasternmost corner of said Lot No. 3, a point; thence South 7½ degrees West 16.80 chains; thence North 82½ degrees West 18.00 chains; thence North 7½

degrees East 16.80 chains; thence South 82½ degrees East 18.00 chains to the point of beginning, said land being situated in St. Charles County, Missouri, and containing 30.0 acres, more or less.

Parcel 2.

All of the NE¼ of Section 36, Township 46 North, Range 2 East, lying West of the West line of U. S. Survey 1798, excepting therefrom a tract of land containing 11.58 acres in the Northwest corner thereof described as beginning at the Northwest corner of the NE¼ of said Section 36, thence East 10.94 chains; thence South 10.36 chains; thence West 10.94 chains; thence North 10.36 chains to the point of beginning; said tract containing 106.36 acres, more or less.

Parcel 3.

Also part of U. S. Survey No. 1798, in Township 46, North, Range 2 and 3 East, bounded and more particularly described as follows: Beginning at a rock in the West line of said Survey 1798, which is South 7½ degrees West 35.00 chains from the Northwest corner of said Survey, thence South 82½ degrees East 19.05 chains to corner, a rock, thence South 7½ degrees West 17.41⅔ chains to corner a rock; thence North 82½ degrees West 19.05 chains to point on West line of Survey 1798, thence along said West line of Survey 1798 North 7½ degrees East 17.50 chains to place of beginning, containing 33⅓ acres, more or less.

Parcel 4.

A tract of land located in the Keitel tract of Lot No. 3 between the Francis Howell Cemetery and the Pitman road in U. S. Survey No. 887, being more particularly described as follows: Beginning at the Southeast corner of the Francis Howell Cemetery; thence East 75 feet to the West line of the Pitman road; thence North along said line a distance of 84 feet to a point; thence West 75 feet to the East line of said Cemetery; thence South along said line 84 feet to the point of beginning, said land being located in St. Charles County, Missouri, and containing .144 acres, more or less.

[fol. 25]

Parcel 5.

A tract of land containing 9.67 acres, being part of the W½ of the NW¼ of Section 6, Township 45 North, Range 3

East, more particularly described as follows to-wit: Beginning in the South line of the Marthasville Road at a rock in the Township line, which rock is distant East 4.38 Chains from another rock in the South line of said road set in the Range line, at or near, the Northwest corner of said Section 6, Township 45 North, Range 3 East; thence from said beginning point South 3 degrees 30 minutes East 40.82 chains to the East and West middle line of Section 6, an old stone in said line, from which a Black Walnut bears North 33¼, West 32 links and a Hickory 8 inches in diameter bears South 89, East 39 links; thence with said line of said Section West 2.37½ chains to a stake; thence North 3 degrees 30 minutes West parallel with the first course 40.82 chains to a stake in the South line of the Marthasville road; thence East with the South line of said road 2.37½ Chains to the point of beginning, containing 9.67 acres.

Parcel 6.

Part of the Southwest fractional quarter of Section 27, Township 46 North, Range 2 East, bounded and more particularly described as follows: Beginning at the southwest corner of said Section 27, a rock, from which a black oak 16 inches in diameter bears South 54 degrees West distant 29 links and a white oak 8 inches in diameter bears North 85 degrees West distant 25 links; thence North 17 chains 90 links to corner, a rock, from which a black oak 12 inches in diameter bears North 30 degrees East distant 17 links and a white oak 4 inches in diameter bears South 13 degrees East distant 22 links; thence South 40¾ degrees East 24 chains 9 links to corner, a rock, on the section line between Sections 27 and 34 of said township and range; thence West 16 chains to the place of beginning, containing 14.32 acres, more or less, and being the same tract of land conveyed by John W. Callison and wife to Nancy E. Callison as per Warranty Deed dated August 3, 1926, and recorded in the Recorder's Office in Book 154 at Page 332.

Parcel 7.

A tract of land situated in U. S. Survey No. 1641, Township 46 North, Range 2 East, described as follows: Beginning at a point in the center of Dardenne Creek distant North 80 degrees 09 minutes East 13.40 chains and North 9 degrees 14 minutes West 21.37 chains from the most northeasterly corner of U. S. Survey No. 280; thence along the western

line of said tract South 9 degrees 14 minutes East 21.37 chains to a stone in the southern line of said U. S. Survey No. 1641 which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280; thence along the southern line of said U. S. Survey No. 1641 North 80 degrees 09 minutes East 21.73 chains to an old stone; thence North 9 degrees 00 minutes West 5.75 chains to a point in the center line of Dardenne Creek; thence northwestwardly along the center line of Dardenne Creek, as now located, to the place of beginning, containing 35 acres, more or less.

[fol. 26] A tract of land situated in fractional Section 24, Township 46 North, Range 2 East, described as follows: Beginning at a stone in the Southern line of U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280 and from which stone a Black Walnut 30 inches bears North 9 degrees 00 mintues West 51½ links; thence South 9 degrees 14 minutes East 10.80 chains to an iron rod; thence North 80 degrees 09 minutes East 17.62 chains to the center line of the former Pitman private road, 16 feet wide; thence North 0 degrees 19 minutes East 11.18 chains to a stone in the southern line of U. S. Survey No. 1641; thence along said Survey line South 80 degrees 09 minutes West 19.44 chains to the place of beginning, containing 20 acres.

All of the above described land being situated in St. Charles County, Missouri, and containing in all 248.824 acres, more or less.

Names of purported owners: Dennis B. Pitman and May Dell Pitman.

Estimated Compensation: $14,600.00.

[fol. 27] Order And Judgment On Declaration Of Taking.

(Filed June 19, 1941.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 997. vs. At Law.
Tract No. 18-A.

248.824 Acres Of Land, More Or Less, Situate In St. Charles County, State Of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al., Defendants.

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter a judgment herein on the Declaration of Taking filed in Case No. 979 on June 16, 1941, and upon consideration of said motion, and the condemnation petition filed herein, and the Declaration of Taking filed in said Cause No. 979, the Court, having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land described in said petition, and also under authority of the Attorney General of the United States.

Second: That said Petition filed herein and the Declaration of Taking heretofore filed in Cause No. 979 state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United States of America, for the purposes therein set forth;

[fol. 28] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fourth: That the said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use;

Fifth: That a map or plan showing the land taken is annexed to and made a part of the said Declaration of Taking;

Sixth: That a statement is contained in the said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 18-A, in the amount of Fourteen Thousand Six Hundred Dollars And No Cents ($14,600.00), and that said sum was deposited in the Registry of this Court in Case No. 979 to the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking:

Seventh: That a statement is contained in the said Declaration of Taking that the amount of the ultimate award of compensation for Tract No. 18-A, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor,

It Is Therefore Ordered And Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of the said Declaration of Taking and depositing in the Registry of this Court of the aforesaid estimated compensation, which land is situated in St. Charles County, Missouri, and described as follows:

[fol. 29] Tract No. 18 A containing 248.824 acres of land, more or less, situate in St. Charles County, Missouri, and more particularly described as follows:

Parcel 1.

A tract of land in Sections 24 and 19, Township 45 North, Ranges 2 East and 3 East, containing 30 acres, more or less, being part of Lot No. 3 as designated and described in the agreed partition of the real estate of James F. Howell, deceased, dated March 29, 1854, and recorded in Book "B" No. 2, pages 450 and following, of Recorder's Office, St. Charles County, Mo., being the remaining portion of said Lot No. 3 after deducting the public road which runs through said Lot No. 3, and 40 acres off the West side thereof conveyed to H. B. Castlio and Mitchell Castlio as per deeds recorded in Book 45, page 209 and Book 38, page 108, and 50 acres conveyed to Boyd Keitel by Dennis B. Pitman as per deed recorded in Book 179, Page 65, said 30 acre tract being more particularly described as follows: Beginning at the northeasternmost corner of said Lot No. 3, a point; thence South 7½ degrees West 16.80 chains; thence North 82½ degrees West 18.00 chains; thence North 7½ degrees East 16.80 chains; thence South 82½ degrees East 18.00 chains to the point of beginning, said land being situated in St. Charles County, Missouri, and containing 30.0 acres, more or less.

Parcel 2.

All of the NE¼ of Section 36, Township 46 North, Range 2 East, lying West of the West line of U. S. Sur-

vey 1798, excepting therefrom a tract of land containing 11.58 acres in the Northwest corner thereof described as beginning at the Northwest corner of the NE¼ of said Section 36, thence East 10.94 chains; thence South 10.36 chains; thence West 10.94 chains; thence North 10.36 chains to the point of beginning; said tract containing 106.36 acres, more or less.

Parcel 3.

Also part of U. S. Survey No. 1798, in Township 46, North, Range 2 and 3 East, bounded and more particularly described as follows: Beginning at a rock in the West line of said Survey 1798, which is South 7½ degrees West 35.00 chains from the Northwest corner of said Survey, thence South 82½ degrees East 19.05 chains to corner, a rock, thence South 7½ degrees West 17.41⅔ chains to corner a rock; thence North 82½ degrees West 19.05 chains to point on West line of Survey 1798, thence along said West line of Survey 1798 North 7½ degrees East 17.50 chains to place of beginning, containing 33⅓ acres, more or less.

Parcel 4.

A tract of land located in the Keitel tract of Lot No. 3 between the Francis Howell Cemetery and the Pitman road in U. S. Survey No. 887, being more particularly described as follows: Beginning at the Southeast corner of the Francis Howell Cemetery; thence East 75 feet to the West line of the Pitman road; thence North along said line a distance of 84 feet to a point; thence West 75 feet to the East line of said Cemetery; thence South along said line 84 feet to the pont of beginning, said land being located in St. Charles County, Missouri, and containing .144 acres, more or less.

[Fol. 30]

Parcel 5.

A tract of land containing 9.67 acres, being part of the W½ of the NW¼ of Section 6, Township 45 North, Range 3 East, more particularly described as follows to-wit: Beginning in the South line of the Marthasville Road at a rock in the Township line, which rock is distant East 4.38 Chains from another rock in the South line of said road set in the Range line, at or near, the Northwest

corner of said Section 6, Township 45 North, Range 3 East; thence from said beginning point South 3 degrees 30 minutes East 40.82 chains to the East and West middle line of Section 6, an old stone in said line, from which a Black Walnut bears North 33¼, West 32 links and a Hickory 8 inches in diameter bears South 89, East 39 links; thence with said line of said Section West 2.37½ chains to a stake; thence North 3 degrees 30 minutes West parallel with the first course 40.82 chains to a stake in the South line of the Marthasville road; thence East with the South line of said road 2.37½ Chains to the point of beginning, containing 9.67 acres.

Parcel 6.

Part of the Southwest fractional quarter of Section 27, Township 46 North, Range 2 East, bounded and more particularly described as follows: Beginning at the southwest corner of said Section 27, a rock, from which a black oak 16 inches in diameter bears South 54 degrees West distant 29 links and a white oak 8 inches in diameter bears North 85 degrees West distant 25 links; thence North 17 chains 90 links to corner, a rock, from which a black oak 12 inches in diameter bears North 30 degrees East distant 17 links and a white oak 4 inches in diameter bears South 13 degrees East distant 22 links; thence South 40¾ degrees East 24 chains 9 links to corner a rock, on the section line between Sections 27 and 34 of said township and range; thence West 16 chains to the place of beginning, containing 14.32 acres, more or less, and being the same tract of land conveyed by John W. Callison and wife to Nancy E. Callison as per Warranty Deed dated August 3, 1926, and recorded in the Recorder's Office in Book 154 at Page 332.

Parcel 7.

A tract of land situated in U. S. Survey No. 1641, Township 46 North, Range 2 East, described as follows: Beginning at a point in the center of Dardenne Creek distant North 80 degrees 09 minutes East 13.40 chains and North 9 degrees 14 minutes West 21.37 chains from the most northeasterly corner of U. S. Survey No. 280; thence

along the western line of said tract South 9 degrees 14 minutes East 21.37 chains to a stone in the southern line of said U. S. Survey No. 1641 which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280; thence along the southern line of said U. S. Survey No. 1641 North 80 degrees 09 minutes East 21.73 chains to an old stone; thence North 9 degrees 00 minutes West 5.75 chains to a point in the center line of Dardenne Creek; thence northwestwardly along the center line of Dardenne Creek, as now located, to the place of beginning, containing 35 acres, more or less.

[fol. 31] A tract of land situated in fractional Section 24, Township 46 North, Range 2 East, described as follows: Beginning at a stone in the Southern line of U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280 and from which stone a Black Walnut 30 inches bears North 9 degrees 00 minutes West 51½ links; thence South 9 degrees 14 minutes East 10.80 chains to an iron rod; thence North 80 degrees 09 minutes East 17.62 chains to the center line of the former Pitman private road, 16 feet wide; thence North 0 degrees 19 minutes East 11.18 chains to a stone in the southern line of U. S. Survey No. 1641; thence along said Survey line South 80 degrees 09 minutes West 19.44 chains to the place of beginning, containing 20 acres.

All of the above described land being situated in St. Charles County, Missouri, and containing in all 248.824 acres, more or less.

Subject to all existing highway and public utility easements but including the fee underlying such existing easements.

[fol. 32] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered and Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the entry of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 19th day of June, 1941.

GEO. H. MOORE,
United States District Judge.

[fol. 33] Order Transferring Fund from the Declaration of Taking in Case No. 979.

(Filed June 19, 1941.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 997. vs. At Law.
Tract No. 18-A.
248.24 Acres of Land, More or Less, Situate in St. Charles County, State of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al., Defendants.

It appearing to the Court that in the Declaration of Taking filed with Case No. 979 on June 16, 1941, there was paid into the Registry of the Court as estimated compensation for Tract No. 979, described in the petition filed herein, the amount of $14,600.00;

On oral motion of the United States Attorney, the Clerk of this Court is directed to transfer $14,600.00, of the whole amount deposited under the Declaration of Taking heretofore filed, to this cause for the use and benefit of the defendants entitled thereto as to Tract No. 18-A.

GEO. H. MOORE,
United States District Judge.

Dated, this 19th day of June, 1941.

[fol. 34] Answer of Defendants Dennis B. Pitman and May Dell Pitman.

(Filed September 3, 1941.)

Now come the defendants, Dennis B. Pitman and May Dell Pitman, wife of Dennis Pitman, and for their separate answer to the petition filed by plaintiff in the above styled and numbered cause, state:

First: That for their answer to paragraph numbered "First" in said petition, these defendants state that the only interest they claim in the property described in plaintiffs petition is such as is hereinafter set out; that on the 7th day of November, 1940, these defendants were the owners in fee simple of the real estate described in said petition and therein referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7, together with the improvements thereon, and that on said 7th day of November, 1940, these defendants, at the instance and request of plaintiff, and on a printed form provided therefor by plaintiff, signed and delivered to plaintiff an option for the sale to plaintiff of the said lands described in plaintiffs petition and therein referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7, whereby plaintiff was granted the right to purchase said parcels of real estate last above mentioned and was also granted the right to acquire from these defendants such title as they might be able to give [fol. 35] to the tract of land in said petition referred to and designated as Parcel 4, all for the price and sum of Thirty-five Thousand Dollars $(35,000.00); that said option further granted the plaintiff the right of immediate occupancy and use of said real estate for any purpose whatsoever from and after the acceptance by plaintiff of said option, such right of acceptance to be exercised by plaintiff within thirty days after said 7th day of November, 1940; that thereafter, on the 14th day of November, 1940, plaintiff duly and legally exercised its right under said option, and on said last named date duly and legally accepted the same, and said option thereupon became a binding and legal contract between plaintiff and these defendants whereby these defendants agreed to sell to plaintiff and plaintiff agreed to purchase from these de-

fendants the real estate in said petition described and referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7, with the improvements thereon, and whereby these defendants agreed to transfer and convey to plaintiff such title as they could give to said tract of land in said petition described and referred to and designated as Parcel 4 (referred to in said option and contract as being cemetery property), and whereby plaintiff agreed to accept such title to said last mentioned parcel, all for and at the price and sum of Thirty-five Thousand Dollars ($35,000.00); that a true copy of said option and of said acceptance thereof by plaintiff, constituting the said contract between plaintiff and these defendants as aforesaid, is hereto attached as "Exhibit A" and is by reference incorporated herein and made a part hereof as fully as if copied herein in words and figures; that thereafter, pursuant to the terms of said option and contract, these defendants, on the 12th day of December, 1940, duly executed to plaintiff a warranty deed, dated said 12th day of December, 1940, which deed was by these defendants duly acknowledged on the 15th day of January, 1941, and delivered to plaintiff, whereby these defendants, for the consideration expressed in said deed, to-wit, [fol. 36] Thirty-five Thousand Dollars ($35,000.00), conveyed to plaintiff the real estate in said petition described and therein referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7, which deed was duly accepted by plaintiff and was, on the 5th day of February, 1941, duly filed for record in the Recorder's Office of St. Charles County, Missouri, and was thereafter duly recorded in said Recorder's Office in Book 199, page 310; and that pursuant to the terms of said option and contract these defendants, on the 15th day of January, 1941, duly executed and delivered to plaintiff a quitclaim deed, dated said January 15, 1941, whereby these defendants remised, released and forever quitclaimed unto plaintiff the tract of land in said petition described and referred to and designated as Parcel 4, which quitclaim deed was duly accepted by plaintiff and was, on February 5, 1941, duly filed for record in the Recorder's Office of St. Charles County, Missouri, and was thereafter duly recorded in said Recorder's Office in Book 198, page 30; to which

deeds the requisite revenue stamps were attached; and that on or about said 15th day of January, 1941, plaintiff took actual possession of all of the lands described in plaintiff's petition and the improvements thereon and has since retained the same and deprived these defendants of all possession thereof.

Second: That for answer to paragraph numbered "Second" in said petition, these defendants admit that the real estate described in said petition is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

Third: That for answer to paragraph numbered "Third" in said petition, these defendants admit that plaintiff was authorized and empowered to acquire the lands in plaintiff's petition described, by purchase, condemnation or otherwise, but deny that plaintiff is now authorized to so acquire said lands except pursuant to and in accordance with the terms of the contract between these defendants and plaintiff which is herein referred to; and admit that the United States Attorney is acting under instruc-
[fol. 37] tions from the Attorney General of the United States, but deny, on information and belief, that he is so acting at the request of the Secretary of War of the United States, and state that under the contract heretofore entered into between plaintiff and these defendants as aforesaid, hereinafter set out, the Secretary of War has no right, power or authority to make any request for the condemnation of said property because of the said contract heretofore made by plaintiff with these defendants and the possession heretofore taken of said land by plaintiff and the deeds executed and delivered by these defendants to plaintiff and accepted by plaintiff as aforesaid.

Fourth: That for answer to paragraph numbered "Fourth" in said petition, these defendants admit that this is an action to acquire by condemnation in fee simple absolute the land described in plaintiff's petition and the improvements thereon and the title thereto, and admit that this action is brought by direction of the Attorney General of the United States, but these defendants state that said action can only be brought pursuant to said contract between

plaintiff and these defendants, and state that whether or not this action is authorized or directed to be brought by the Secretary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257) and The Act of Congress approved July 2, 1917, USC 50; 171 as amended, is immaterial herein because of the said contract and the said acceptance by plaintiff of said deeds to said property and the said taking possession of said property by plaintiff; and these defendants admit that the Act of Congress approved June 26, 1940 (Public No. 667-76th Congress) and the Act of Congress approved September 24, 1940 (Publ. Res. 99—76th Congress) appropriated funds for the acquisition of said property by plaintiff.

Fifth: That for answer to paragraph numbered "Fifth" in said petition, these defendants admit that the acquisition of the lands described in said petition for military purposes for an ordnance plant and the national defense of the United States is within the purview of the sovereign plaintiff and of the Congress of the United States, and admits that the said property is located within the jurisdiction of this Court.

[fol. 38] Sixth: That for answer to paragraph numbered "Sixth" in said petition, these defendants state that they have no information sufficient to form a belief as to whether or not the opinion of the Secretary of War is that it is necessary or advantageous to the interests of plaintiff that said property be acquired by condemnation under judicial process, and state that the opinion of the Secretary of War as to that matter is immaterial herein because of the said contract entered into by and between plaintiff and these defendants as aforesaid, the said delivery to and acceptance by plaintiff of said deeds to said property and the taking possession of said property by plaintiff as aforesaid; and these defendants admit that the money has been appropriated and is available to pay for said lands.

Seventh: That for answer to paragraph numbered "Seventh" in said petition, these defendants admit that the property sought to be condemned by this proceeding and described in said paragraph numbered "Seventh" is subject to all existing highway and public utility easements, but including the fee underlying such existing easements,

and state that said property described in said paragraph numbered "Seventh" is the same property described in the contract aforesaid between plaintiff and these defendants, and that the property described in said paragraph numbered "Seventh" in said petition and therein referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7 is the same property that was conveyed by these defendants to plaintiff by said warranty deed of date December 12, 1940, and that the property described in said "Seventh" paragraph in said petition and therein referred to and designated as Parcel 4 is the same property that was remised, released and quitclaimed by these defendants to plaintiff by said quitclaim deed of date January 15, 1941, and that these defendants make no claim to any of the aforesaid property except such as is set out in this answer; but these defendants deny that the land in [fol. 39] said petition described and referred to and designated as Parcel 2 contains 106.36 acres, and state that the same contains 73.027 acres; that said land referred to and designated in said petition as Parcel 2 and that referred to and designated therein as Parcel 3, together contain 106.36 acres, more or less; and that all of the lands mentioned and described in said petition contain 215.491 acres, more or less.

Eighth: That for answer to paragraph numbered "Eighth" in said petition, these defendants admit that the property in plaintiff's petition described and therein referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7 is subject to liens or claims for general taxes assessed as of June 1, 1940.

Ninth: That for answer to paragraph numbered "Ninth" in said petition, these defendants state that whether or not there are within the boundaries of the land described in plaintiff's petition roads or highways is immaterial herein because of the said deeds by these defendants to plaintiff as aforesaid and the acceptance thereof by plaintiff and the taking of possession by plaintiff of said property, and that upon the payment to them of the amount agreed upon by said contract these defendants will be unable to claim or assert any reversionary interest or any interest in or to any of such premises that may be so occupied by roads or highways; and these defendants admit that by condem-

nation proceedings any reversionary interest which these defendants might have asserted except for said contract, the acceptance by plaintiff of said deeds and the taking of possession by plaintiff of said property, as aforesaid, will be included and covered by condemnation thereof by plaintiff herein.

Tenth: That for answer to paragraph numbered "Tenth" in said petition, these defendants state that there are no other persons except these defendants who have or can have or claim to have any interest in or to any of the property in said petition described and referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel [fol. 40] 6 and Parcel 7, or any right under or by virtue of the contract aforesaid.

Eleventh: That for answer to paragraph numbered "Eleventh" in said petition, these defendants state that there are no other persons except these defendants who have or can have or claim to have any interest in or to any of the property in said petition described and referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7, or any right under or by virtue of the contract aforesaid.

Twelfth: Further answering said petition, these defendants state that on or about the 7th day of November, 1940, they granted unto plaintiff an option in writing to purchase the property in said petition described and therein referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7, with the improvements thereon, and to acquire from these defendants such title as they might be able to give to the tract of land in said petition referred to and designated as Parcel 4, all for the price and sum of Thirty-five Thousand Dollars ($35,000.00); that thereafter, pursuant to the terms of said option, said option was exercised and accepted on the 14th day of November, 1940, by plaintiff, by and through its duly authorized official, and said option and said acceptance thereof became and is a binding contract between plaintiff and these defendants; that a true copy of said option and of said acceptance thereof by plaintiff, constituting the said contract between plaintiff and these defendants, is attached hereto as "Exhibit A" and is by reference incorporated herein and made a part

hereof as fully as if copied herein in words and figures; that thereafter, on the 12th day of December, 1940, these defendants duly executed and delivered to plaintiff a warranty deed, dated said 12th day of December, 1940, which deed was by these defendants duly acknowledged on the 15th day of January, 1941, and delivered to plaintiff, whereby these defendants duly conveyed to plaintiff the real estate in said petition described and referred to and designated as Parcel 1, Parcel 2, Parcel 3, Parcel 5, Parcel 6 and Parcel 7; that said warranty deed was duly accepted by [fol. 41] plaintiff and was, on the 5th day of February, 1941, duly filed for record in the Recorder's Office in Book 199, page 310; that on the 15th day of January, 1941, these defendants duly executed and delivered to plaintiff a quitclaim deed, dated said January 15, 1941, whereby these defendants duly remised, released and forever quitclaimed unto plaintiff the tract of land in said petition described and referred to and designated as Parcel 4 and conveyed to plaintiff all their right, title, and interest in or to the same, which quitclaim deed was duly accepted by plaintiff and was, on February 5, 1941, duly filed for record in the Recorder's Office of St. Charles County, Missouri, and was duly recorded in said Recorder's Office in Book 198, page 30; that on or about said 15th day of January, 1941, plaintiff took possession of the lands described in plaintiff's petition and removed or destroyed the improvements thereon and has continuously since said time been in possession of said real estate and is now in possession thereof; that the said deeds were made and delivered to and accepted by plaintiff pursuant to the terms and provisions of the contract aforesaid; that under and pursuant to the terms of said contract plaintiff had the right to institute a proceeding in condemnation for the acquisition of the lands described in said petition or for having the title thereto vested or confirmed in plaintiff by the judgment of this court in such condemnation proceeding, and that, notwithstanding the conveyances by these defendants to plaintiff as aforesaid, plaintiff has exercised the right to institute and has instituted this condemnation proceeding against said lands and these defendants and the other defendants named herein; none of which other defendants have any right, title or interest in or to any of the lands described in plaintiff's petition; and that under and by virtue of the terms

and provisions of said contract, it was agreed by and between plaintiff and these defendants that if such condemnation proceeding should be instituted the amount of the award therein would, by consent, be fixed at the agreed valuation named in said option and contract as aforesaid, namely, Thirty-five Thousand Dollars ($35,000.00), and that [fol. 42] in such proceeding the plaintiff would, upon the filing of the petition in such proceeding, deposit said sum with the clerk of this Court to be disbursed by said officer pursuant to the judgment or decree entered in such condemnation proceeding; and that by reason of the exercise by plaintiff of the right to institute this proceeding in condemnation, and the said contract and the other facts and matters aforesaid, these defendants are entitled to an immediate award in their favor in this proceeding in said sum of Thirty-five Thousand Dollars ($35,000.00) with interest thereon from the date of the actual taking of said lands and improvements by plaintiff as aforesaid, to-wit, January 15, 1941, are entitled to have said sum, with interest thereon as aforesaid, forthwith paid by plaintiff to the clerk of this Court for their benefit, and to the judgment and decree of this Court requiring the Clerk to forthwith pay the same over to these defendants; and these defendants state that this Court has no jurisdiction or authority to appoint commissioners herein or to take any other or further steps in this condemnation proceeding except to enter judgment herein awarding these defendants said sum of Thirty-five Thousand Dollars ($35,000.00), with interest thereon as aforesaid, directing that the same be paid by plaintiff into the hands of the clerk of this Court, and ordering, adjudging and decreeing that the clerk of this Court pay the same over to these defendants; and these defendants further state that by reason of the facts and matters aforesaid, plaintiff is estopped to claim that it has any right to proceed in this condemnation proceeding except in accordance with the aforesaid contract, and is estopped to claim that it is entitled to the appointment of commissioners herein, and is estopped to claim that any further steps may be taken or proceedings had herein except to enter judgment [fol. 43] herein awarding these defendants said sum of Thirty-five Thousand Dollars ($35,000.00), with interest thereon as aforesaid, and directing that the same be paid by plaintiff to the Clerk of this Court, and ordering, ad-

judging and decreeing that the clerk pay the same over to these defendants.

Thirteenth: And these defendants further state that they have fully and completely performed all of the terms and conditions of the contract aforesaid thereby required to be performed by them, but that plaintiff has failed, neglected and refused to perform said contract on its part, and has failed, neglected and refused to pay to the clerk of this Court the amount therein agreed to be so paid by plaintiff in the event of the institution by plaintiff of such condemnation proceeding, and that by reason of all of the foregoing these defendants are entitled to have judgment forthwith entered in their favor as aforesaid and to be awarded said sum of Thirty-five Thousand Dollars ($35,000.00), with interest thereon as aforesaid, for the lands described in plaintiff's petition and the improvements that were thereon when plaintiff took possession thereof as aforesaid, and to have the same forthwith paid by plaintiff to the clerk of this Court and to be by him forthwith disbursed to these defendants as aforesaid.

Wherefore, these defendants pray that the Court, without the appointment of commissioners herein, and without other intermediate steps or proceedings herein, at once enter its judgment, order and decree herein fixing the award for the lands described in plaintiff's petition and the improvements thereon when plaintiff took actual possession thereof as aforesaid at the sum of Thirty-five Thousand Dollars ($35,000.00), the amount agreed upon by the parties as aforesaid, with interest thereon at the rate of six per cent. (6%) per annum from and after January 15, 1941, and ordering, adjudging and decreeing that plaintiff forthwith deposit the same with the clerk of this Court, and ordering and decreeing and directing that the same be forthwith disbursed by said officer to these defendants, pursuant to the terms of said contract and of such judgment and decree; and that these defendants be awarded and have such other and further relief and such further orders, judg-
[fol. 44] ments and decrees herein as may be necessary or appropriate to secure to them the said sum of Thirty-five

Thousand Dollars ($35,000.00), with interest as aforesaid, and as may be meet and proper in the premises.

THEO. BRUERE, JR.,
St. Charles Savings Bank Building,
St. Charles, Missouri.

WM. H. ALLEN,
1725 Pierce Building, St. Louis, Mo.

Copy of within answer received this 3 day of September, 1941.

A. G. EDWARDS,
Attorney for Plaintiff
(Special Assistant to the U. S. Attorney)

[fol. 45] W 766 QM 2417 "Exhibit A".

Option to Purchase Land.

Know All Men By These Presents: That the undersigned Dennis B. Pitman and May Dell Pitman, his wife for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell and convey to the Government for the consideration of Thirty-Five Thousand Dollars ($35,000.00) that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

Being six tracts of land containing in all 215 acres, more or less, and more particularly described as follows, to-wit:—

A tract of land containing Nine and 67-100 acres, being part of the West half of the Northwest quarter of Section Six, Township 45 N. Range, 3, East, more particularly described as follows to-wit: Beginning in the South line of the Marthasville road at a rock in the Township line, which rock is distance East 4.38 Chains from another rock in the South line of said road set in the Range line, at or near, the Northwest corner of said Section 6, Township 45

N. Range 3, East. Thence from said beginning point S. 4.1-2 E. 40.82 Chains to the South line of said Section 6, an old stone in said South line, from which a Black Walnut bears North 33.1-4, West 32 links and a Hickory 8 inches in diameter bears South 89, East 39 links. Thence with the South line of said Section West 2.37-1-2 chains to a stake. Thence North 4.1-4 W. Parallel with the first course 40.82 Chains to a stake in the South line of the Marthasville road. Thence East with the South line of said road 2.37-1-2 Chains to the point of beginning. Containing Nine and 67-100 acres. (According to a survey made by Alfred Risks of St. Charles, Mo. on Dec. 13th, 1907. This tract contained Eleven and 246-1000 acres).

First, Part of the southwest fractional quarter of Section Twenty-seven (27), Township Forty-six (46) North, Range Two (2) East, bounded and more particularly described as follows:—Beginning at the southwest corner of said section Twenty-seven (27), a rock, from which a black oak 16 inches in diameter bears S. 54° W. distant 29 links and a white oak 8 inches in diameter bears N. 85° W. distant 25 links; thence North seventeen chains and 90 links to corner, a rock, from which a black oak 12 inches in diameter bears N. 30° E. distant 17 links and a white oak 4 inches in diameter bears S. 13° E. distant 22 links; thence S. 40 ¾° E. twenty-four chains and 9 links to corner, a rock, on the section line between sections 27 and 34 of said township and range; thence West sixteen chains to the place of beginning, containing 14-32/100 acres, more or less, and being the same tract of land conveyed by John W. Callison, and wife to Nancy E. Callison as per warranty deed dated August 3, 1926, and recorded in the Recorder's Office in Book 154 at Page 332.

[fol. 46] First. A tract of land situated in U. S. Survey No. 1641, Twp. 46 N. R. 2 E. described as follows: Beginning at the intersection of the western line of a tract of land conveyed to J. C. Pitman by David L. Twiehaus and wife, dated Aug. 30, 1870, and recorded in the Recorder's Office of St. Charles County, Mo. in Book 5 at page 276 and the center line of Dardenne Creek, as the same is now located, thence along the western line of said tract, S. 90° 14′ E. 21.37 chains to a stone in the southern line of said U. S. Survey No. 1641 which stone is distant 13.40 chains

N. 80° 09′ E. from the northeastern corner of U. S. Survey No. 280; thence along the southern line of said U. S. Survey No. 1641, N. 80° 09′ E. 21.73 chains to an old stone; thence N. 90° 00′ W. 5.75 chains to a point in the center line of Dardenne Creek; thence northwestwardly along the center line of Dardenne Creek, as now located, to the place of beginning, containing 35 acres, more or less.

Second: A tract of land situated in fractional Section 24, Twp. 46 N. R. 2 E. described as follows: Beginning at a stone in the southern line of U. S. Survey No. 1641, which stone is distant 13.40 chains N. 80° 09′ E. from the northeastern corner of U. S. Survey No. 280 and from which stone a Blark Walnut 30″ bears N. 9° 00′ W. 51 ½ links; thence S. 9° 14′ E. 10.80 chains to an iron rod; thence N. 80° 09′ E. 17.62 chains to the center line of the former Pitman private read, 16 feet wide; thence N. 0° 19′ E. 11.18 chains to a stone in the southern line of U. S. Survey No. 1641; thence along said Survey line S. 80 09′ W. 19.44 chains to the place of beginning, containing 20 acres. Subject, however, to the right of way out of a county road along the eastern line of said tract.

This Deed of Correction is made for the purpose of correcting the quit-claim deed from Eltin Pitman and Maud Pitman, his wife, and Tarlton E. Pitman and Annetta M. Pitman, his wife, of St. Charles County, Mo. and Halia A. Schneider and Melvin A. Schneider, her husband, of St. Louis County, Mo., parties of the first part, to Dennis B. Pitman and May Dell Pitman, his wife, of St. Charles County, Mo. parties of the second part, dated on Sep. 16, 1936, and recorded in the Recorder's Office of St. Charles County, Mo. in Book 186 page 14, in which deed the consideration was omitted and for correcting the name of Maude Pitman, which should have read Maud Pitman.

Two pieces of land together containing Eighty (80) Acres and being all of lot No. Three (3) as the same is designated and described in an agreed parti on of the real estate of James F. Howell, deceased, dated March 29th, 1854, and recorded in the Office of the Recorder of Deeds of St. Charles County, Mo., in Book B. No. 2 pages 450 and following: conveyed to John Fitz by John L. Moore and Robert B. Frayser, and wives by deed dated June 12,

1865, and recorded in said Recorder's Office in Book U. No. 2 page 163, save and excepting therefrom the public road over said Lot. No. 3 and forty acres off of the west side of said Lot No. 3, conveyed to H. B. Castlio and Mitchell Castlio by Nicolas Zeyen, Administrator of the Estate of John Fitz, deceased, by deed dated Feb. 8th, 1886 and recorded in said Recorder's Office in Book 45 page 209 and by deed of Margaret Fitz, dated Jan. 30th, 1886, and recorded in said Recorder's Office in Book 38 page 108. Except, however, from the above tract, fifty (50) acres sold by Dennis B. Pitman to Boyd Keitel.

All of the South half of the Northeast fractional quarter of Section 36, Township 46 North R. 2 East containing 40 acres, more or less. Also the North half of the Northeast fractional quarter of said Section 36, Township 46 North, Range 2 East, excepting a tract of 11.58-100 acres in the Northwest corner thereof conveyed to Amanda Pitman by Deed from Hiram B. Castlio dated July 18th 1898 and recorded in book 74 page 45 of the Recorder's Office. Also part of survey No. 1798 in Township 46 North, Ranges 2 and 3 East, bounded and more particularly described as follows, to-wit: Beginning at the Southwest corner of the tract hereby conveyed, a rock in the West line of said survey No. 1798 from which a Wild Cherry one inch in diameter [fol. 47] bears South 7.1-2 W. distant 6 links, and a Cotton Wood 4 inches in diameter bears N. 7.1-2 E. distant 18 links. Thence along and with the west line of said survey N. 7.1-2 E. 17 chains and 50 links to corner on same a rock. Thence South 82. 1-2 E, 19 Chains and 5 links to corner, a rock; thence South 7.1-2 W. 17 chains and 41. 2-3 links to corner, a rock, from which a Locust Tree ten inches in diameter bears S.67, E. distant 79 links and a Locust 6 inches in diameter, N. 82.1-2 W. distant 207 links; thence N. 82,1-2 W. 19 chains and 5 links to the place of beginning. Containing 33.1-3 acres, more or less.

The Three tracts of land herein above described as Surveyed by Carr Edwards of St. Charles, Mo. September 21st, and 22nd, 1906 contained 106.36 acres.

They are the same tracts given and devised in the 3rd, clause, as modified by the 2 Codicil, of the Last Will and Testament of Iantha Hiram B. Castlio Decd. To Clara

Wheeler Castlio—Serena Hays—Alletha Castlio. Castlio, and Mary Thomas Bishop. The said Alletha Castlio having subsequently conveyed her undivided interest to the said Mitchell Castlio as per Deed dated August 11th. 1905.

Plot of land 84 x 75. Located between Francis Howell Cemetery and Pitman Road. Row of evergreen trees along road line. If title can be given—cemetery.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

[fol. 48] The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company show-

ing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all [fol. 49] the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at St. Charles, Missouri, this 7th day of November, 1940.

DENNIS B. PITMAN,
MAY DELL PITMAN.

Witness:
Theo. Bruere, Jr.
J. C. Baker.

Accepted by and on behalf of the United States of America this 14th day of November, 1940.

M. D. VALLIANT,
Colonel, Q.M.C. United States Army.

[fol. 50] Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option.

(Filed April 17, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed in this cause and for defendants fixing defendants' compensation for the taking of said real estate in the amount named in the option, without interest, and as reasons for said motion states:

(1) That this suit was filed by plaintiff to acquire, by condemnation, the real estate described in the petition filed in this cause, that a Declaration of Taking was filed and the sum of $14,600.00 was deposited in the Registry of the Court as the estimated just compensation for said real estate;

(2) That prior to the filing of the petition in this cause the defendants and the plaintiff, through the War Department, had executed an option contract for the purchase by the United States of America from the defendants the said real estate for the sum of $35,000.00, being the amount of compensation fixed in said option contract;

(3) The United States Supreme Court in the case of Muschany vs. United States, 89 L. Ed. Adv. Op. 492 (1945) has held an option contract to be valid and binding, [fol. 51] which option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation;

(4) That the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands described in plaintiff's petition for the purposes therein defined and against the defendants named in this cause, and against each and all of them, jointly and severally, as their rights may appear, and that the defendants, and each and all of them, jointly and severally are entitled to compensation in solido in the sum of $35,000.00, without interest, being the full amount of the compensation mentioned in said option contract;

(5) That R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, under the terms and conditions of the said option contract, have, or may have, some right, title or interest in and to the said sum of $35,000.00 mentioned in said option contract.

Wherefore, plaintiff moves the Court to enter judgment in this cause for the condemnation of the said real estate, fixing the compensation to be paid by plaintiff to the defendants in the sum of $35,000.00, and directing plaintiff to pay into the Registry of the Court the deficiency of $20,400.00 and to make an order citing all persons and corporations, including the said R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, claiming an interest in the said fund to appear in this Court and to set up and file their claims therefor.

HARRY C. BLANTON,
United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Dated this 17th day of April, 1945.

[fol. 52] Order Setting Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option for Hearing.

(Filed April 17, 1945.)

On oral motion of the plaintiff, by its attorneys, it is Ordered by the Court that the Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option filed by plaintiff in this cause be and the same is hereby set for hearing on the 7th day of May, 1945;

It is further Ordered that the Order of Continuance entered in this cause on the 5th day of February, 1945, continuing this cause to May 3, 1945 and the same is hereby set aside;

And it is further Ordered that the plaintiff give notice of the date fixed for the hearing of said motion to all defendants in this cause and to their attorneys of record by mailing to each of said defendants, whose places of residence are known, and their attorneys and to R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option and a copy of this order, and by posting in the office of the Clerk of this Court in the City of St. Louis, Missouri a copy of said Motion for judgment for plaintiff in condemnation and for defendants fixing compensation by option, together with a copy of this order, at least ten days before the time fixed in this order for the hearing of said motion.

Dated this 17th day of April, 1945.

GEO. H. MOORE,
United States District Judge.

[fol. 53] **Answer of Defendants Dennis B. Pitman and May Dell Pitman, his wife, to Plaintiff's Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option Without Interest; and Counter-Motion of said Defendants for Judgment with Interest.**

(Filed May 4, 1945.)

Come now defendants Dennis B. Pitman and May Dell Pitman, his wife, in response to the motion heretofore filed by plaintiff in this cause asking the Court "to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed in this cause and for defendants fixing defendants' compensation for the taking of said real estate in the amount named in the option, without interest," and for their answer to said motion these defendants say:

1. They admit that the suit was filed by plaintiff to acquire said real estate by condemnation, that a Declaration of Taking was filed and the sum of $14,600.00 was deposited by plaintiff in the registry of the Court as the estimated just compensation for said real estate.

2. They admit that prior to the filing of the petition in this cause these defendants and the plaintiff, through the War Department, executed the contract referred to in said motion as the option contract for the purchase by plaintiff from these defendants of the said real estate for the sum of $35,000.00.

3. They admit the statements contained in paragraph numbered 3 of plaintiff's said motion.

4. They admit that plaintiff, by virtue of this proceeding, is entitled to judgment in condemnation against the lands described in plaintiff's petition, but deny that plaintiff has any right to avoid the payment of interest on that portion of said sum of $35000.00 which plaintiff, upon the filing of said Declaration of Taking, failed to pay into the registry of the Court and which plaintiff now offers to pay into the registry of the Court, to-wit, $20,400.00, and state that it was plaintiff's duty under the terms of said contract to pay into the registry of the Court, upon the filing of said Decleration of Taking, said entire sum of $35,000.00, and that under the terms of the Federal Statutes authorizing the taking of land by the United States in a condemnation proceeding on declaration of taking, to-wit, Section 258a of Title 40 U. S C. A., these defendants are entitled to have the compensation for the taking of said land fixed at said sum of $35,000.00 plus interest on said sum of $20,400.00, at the rate of 6% per annum, from and after the time of the taking by the filing of said Declaration of Taking and the entry of said judgment thereon, [fol. 54] to-wit, on the 19th day of June, 1941, until payment in full of said compensation be made.

5. And these defendants move and pray that the Court, by its judgment herein, fix the compensation to be paid by plaintiff for the taking of said land at the sum of $35,000.00 plus interest on said deficiency of $20,400.00, at the rate of 6% per annum, from and after said June 19, 1941, and order and require that plaintiff pay into the registry of the Court said further sum of $20,400.00 with interest thereon at said rate from and after said June 19, 1941, and that, upon such payment being made, the funds that shall then be in the registry of the Court herein be,

by the proper orders and judgment of this Court, disbursed and paid over to these defendants.

WM. H. ALLEN,
Attorney for defendants Dennis B. Pitman and May Dell Pitman.
(Wm. H. Allen, 112 N. 4th St., St. Louis 2

Copy of the foregoing answer and motion is hereby acknowledged this .... day of May, 1945.

.....

[fol. 55] (List of Checks deposited in Registry of District Court to cover certain Lands in Weldon Spring Ordnance Project.)
(Filed May 17, 1945.)

In The United States District Court
Eastern District Of Missouri
Eastern Division

Weldon Spring Ordnance Project

Cases No.	767	— Deficiency —	$26,900.04	818	— Def. —	$114.00
	765	— " —	7,028.20	817	— " —	8,140.00
	766	— " —	22,365.00	820	— " —	19,193.00
	763	— " —	3,125.00	822	— " —	6,760.00
	764	— " —	22,791.00	824	— " —	4,770.00
	771	— " —	6,170.00	823	— " —	13,892.00
	772	— " —	660.00	854	— " —	6,100.00
	777	— " —	5,855.00	877	— " —	3,725.00
	778	— " —	2,935.20	865	— " —	567.00
	779	— " —	3,967.83	866	— " —	7,510.00
	780	— " —	2,000.00	863	— " —	932.50
	781	— " —	875.00	873	— " —	7,457.20
	782	— " —	5,792.00	872	— " —	6,900.00
	783	— " —	5,700.00	858	— " —	3,443.00
	784	— " —	4,368.00	860	— " —	8,040.00
	785	— " —	34,250.00	859	— " —	16,480.00
	786	— " —	2,630.18	862	— " —	2,200.00
	796	— " —	19,694.00	879	— " —	1,440.00
	805	— " —	21,511.25	875	— " —	5,729.00
	812	— " —	6,080.00	876	— " —	7,695.00
	810	— " —	110.00	856	— " —	4,300.00
	813	— " —	4,428.75	868	— " —	1,380.00
	814	— " —	7,283.00	869	— " —	3,697.00
	797	— " —	3,825.00	960	— " —	48,500.00
	806	— " —	2,940.00	978	— " —	14,132.00

808	"	11,140.00	985	"	1,240.00
811	"	5,435.00	983	"	21,374.25
834	"	4,878.00	984	"	1,500.00
841	"	8,670.00	999	"	2,140.00
833	"	2,150.00	1000	"	500.00
840	"	3,580.00	1001	"	2,500.00
832	"	760.00	1002	"	11,115.25
827	"	7,940.00	1003	"	29,297.00
843	"	4,620.00	979	"	7,120.00
830	"	1,200.00	981	"	25,000.00
829	"	312.00	980	"	16,312.50
839	"	4,860.00	989	"	3,100.00
838	"	2,440.00	986	"	2,600.00
844	"	1,493.36	987	"	18,000.00
835	"	6,960.00	992	"	933.00
826	"	3,760.00	993	"	3,617.00
852	"	17,460.00	994	"	1,100.00
853	"	850.00	995	"	16,000.00
774	"	1,563.00	997	"	20,400.00
798	"	8,260.00	991	"	1,750.00
803	"	4,100.00	1006	"	3,600.00
789	"	10,820.00	1010	"	32,804.45
792	"	9,775.74	1015	"	23,129.45
800	"	36,720.00	1014	"	450.00
790	"	8,440.00	1021	"	7,140.00
791	"	9,042.00	1019	"	12,174.00
793	"	5,100.00	1020	"	6,170.20
794	"	17,985.00	1648	"	1,670.00
804	"	14,780.00	1652	"	2,723.00
819	"	3,050.00.			

$920,085.35

[fol. 56] Check No. 8,051,506 $87,595.70
8,051,507 48,500.00
8,051,508 4,393.00
8,051,509 115,932.50
8,051,510 182,604.74
8,051,511 85,468.10
8,051,512 229,583.57
8,051,513 7,028.20
8,051,514 83,798.54
8,051,515 22,365.00
8,051,516 26,900.00
8,051,517 22,791.00
8,051,518 3,125.00

$920,085.35

of the Treasurer of the United States, in the sum of $920,085.35, to the order of the Clerk of the United States District Court for the Eastern District of Missouri, Eastern Division, deposited by the plaintiff for the lands described in the petitions, the aforesaid sum of $920,085.35 being deposited by the plaintiff in the Registry of the Court herein as to the aforesaid lands, for the use and benefit of the person or persons entitled thereto, the same to be applied under orders of this Court.

HARRY C. BLANTON,
United States District Attorney.

Received the above mentioned checks and deposited same in the Registry of this Court, this 17th day of May, 1945.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.

[fol. 57] Opinion of Court.

(Filed June 8, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,

vs.

Certain Lands in St. Charles County, Missouri, Known as The Weldon Spring Area, Defendants.

No. 765; No. 767; No. 771;
No. 777; No. 781; No. 785;
No. 791; No. 797; No. 805;
No. 807; No. 810; No. 811;
No. 817; No. 827; No. 835;
No. 841; No. 865; No. 874;
No. 875; No. 877; No. 985;
No. 987; No. 991; No. 995;
No. 997; No. 1000; No. 1001;
No. 1010; No. 1015; No. 1021.

All of these cases, except Numbers 807 and 874, now come before this Court on motions filed in each by the Plaintiff, United States of America, for entry of judgment

in the amount of the compensation fixed in certain option contracts, but without interest thereon, and certain counter-motions by Defendants asking for judgment with interest on the principal amounts since the date of taking. Numbers 807 and 874 (Muschany and Andrews cases) are here on motions by the Plaintiff to delete interest from judgments already entered, but the issues therein presented differ only slightly. This opinion is to be considered as filed in and ruling all of the above numbered separate proceedings.

The lengthy history of this condemnation litigation is already adequately documented in the Reports and needs no further recitation. The facts of the original proceedings appear in the contrary opinions of District Court Judges Davis and Collet, United States vs. Certain Land Situate in St. Charles County, Mo., et al., 46 F. Supp. 921, and United States vs. 94.68 acres of Land in St. Charles County, Mo., et al., 45 F. Supp. 1016; in the Eighth Circuit Court of Appeals opinion in United States vs. Muschany, 139 F. 2d, 661; and in the opinion of the Supreme Court of the United States in Muschany vs. United States, [fol. 58] 89 L. Ed. 492. In addition, the facts surrounding the present motions are ably stated in the opinion of Judge Hulen filed in Division No. 2 of this Court on the 4th day of May, 1945, covering identical motions in companion cases to those now before this division. The issues here presented differ in no respect from those decided by Judge Hulen and, with the above references to source materials where the facts may be found, the Court will state its views and holding on the issues presented, which, I deeply regret, are not in accord with those of my learned brother Hulen.

After careful consideration of the various submitted briefs of counsel, the real issues presented for decision appear to be four in number. First, the question is raised whether there is anything in the facts of these cases that makes them a particular type of condemnation proceeding to which that part of the Statute allowing interest to landowners does not apply; second, whether if in such a condemnation proceeding interest is ever allowable, these landowners have by any contract, election, waiver, stipu-

lation or option done anything to waive, give up, or bar themselves from, a right that they might otherwise have: third, whether, if the landowners are entitled to interest, they are entitled to it from the date of the actual taking or only from the date of the filing of the declaration of taking; and, fourth, whether the original decrees entered only in the Andrews and Muschany cases (those appealed to the Supreme Court), which expressly provide for interest, are final and binding on the interest issue in those two cases and, also, binding as precedent or through special agreement of the Government in all the other cases. The Court will discuss the above issues seriatim.

[fol. 59] There is no dispute between the parties that the general rule is (absent a contract or statute evincing a contrary intent) that interest does not run against the United States upon claims or contracts even though there has been an unreasonable delay or default in the payment of the principal upon the part of the Government. Tilson vs. United States, 100 U. S. 43; United States vs. North America Company, 253 U. S. 330; Angarica vs. Bayard, 127 U. S. 251; United States vs. North Carolina, 136 U. S. 211; Smyth vs. United States, 302 U. S. 329. Likewise, there is no dispute that in ordinary condemnation proceedings an exception is made which Congress has by statute approved and codified. Title 40 U. S. Code, Section 258a; Seaboard Railway vs. United States, 261 U. S. 299; United States vs. Rogers, 255 U. S. 163. The parts of said Statute material here are:

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation

stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but [fol. 60] interest shall not be llowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency." (Emphasis the Court's.)

The difference of opinion between the parties first arises on the question of whether the particular facts here cause these proceedings to be a type of condemnation proceeding to which that part of the statute relating to interest is inapplicable.

The Court is of the opinion that under the policy of Congress, as expressed by the above statute, and under the facts, there is no valid reason why these landowners should not receive the benefit of the statutory exception. It is true that the negotiations between the Government and the landowners originally resulted in option contracts. It is also true that those contracts provided for condemnation proceedings under certain restricted circumstances.

Those facts, however, do not change the circumstance that there are now before this Court condemnation proceedings brought under the general condemnation statute, and in no respect different from any other like proceedings except in the method of ascertaining the value of the land. These are not friendly condemnation proceedings for the purpose of clearing title but, as the long history of litigation prior to these motions will readily prove, they are as completely antagonistic and adversary actions as this Court has ever seen. These proceedings for condemnation were certainly not brought within the terms of the option con- [fol. 61] tracts, since those options provide only for friendly proceedings "if for any reason the title to the land is not approved by the Attorney General." It is certain that no other type of condemnation proceeding was within the contemplation of the parties when the option contracts were entered into. The history of these cases shows that the Government brought these actions as straight adversary condemnation proceedings, in complete disregard of the option contracts, and that the entrance of those contracts into the issues was by way of equitable defense on the part of the landowners. Those option contracts have played a part, therefore, in these proceedings to the extent of fixing the worth of the land, but it would be completely erroneous to say that they in any way make these a different type of condemnation proceeding, or that those options have been specifically enforced in their entirety.

Such being the facts, no reason appears on the face of the Statute why these landowners, different from any other landowners, should be divested of the right to interest on the deficiencies of their awards. The statute merely provides that "said compensation shall be ascertained and awarded in said proceeding and established by judgment". No distinction is made in the statute between different methods of ascertaining the compensation. Had the value of the land here been found by a jury, by commissioners, or by stipulation filed in the case, the statute in the absence of express waiver would make no distinction in regard to interest in any case where a deficiency in the deposit existed. Why, therefore, should there be any distinction because the value of the land was fixed by an agreement

prior to suit between the parties, which agreement, it should be noted, was enforced against a recalcitrant Government on equitable principles?

[fol. 62] These landowners certainly come within the spirit of the statute and the intent of Congress. The history of the statute, as admitted by the parties, shows that its purpose was to grant interest not as interest, but as part of the compensation, i.e., to compensate for the loss of the use of the land, or the use of the value thereof in money, pendente lite, Seaboard Railway vs. United States, supra; United States vs. Rogers, supra. The properties of these people were taken from them some time prior to the institution of these suits and only since submission of the present motions has the Government begun to deposit the full amounts due under the options. Thus, they have lost both the use of the land and the use of their money, and it was just such a situation as this that Congress intended to remedy by making the unusual exception to the rule that the United States pays no interest.

To say that this is a different type of condemnation proceeding pursuant to contract is to ignore the fact that the contracts never have been enforced in full and never will be. The original proceedings were not suits for specific performance of the contracts because, had they been, the result should have been the dismissal of these actions. On equitable principles the amount of compensation was fixed and charged against the United States under the terms of the options, but the United States itself has defaulted and still defaults on many of the terms of the contracts. For example, it has not—as the contracts provided—accepted deeds and paid the agreed purchase price upon the furnishing of satisfactory certificates of title. That it can and will never do. Neither has it brought condemnation proceedings for the sole reason assigned in the options for doing so. Nor has it, when bringing condemnation proceedings, followed the terms of the contracts, which provide that—

"The Government will proceed to acquire the land by condemnation proceedings instituted in the District Court [fol. 63] of the United States in which said property is located, under a consent verdict fixing the award at the

agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court." (Emphasis the Court's.)

The requirement for a deposit upon the filing of the petition has certainly never been performed by the Government and never can be. The Government has made no offer to consent to a verdict and yet, through its Agents, contends that it simply wishes to go through with the original contract. That, it is manifest, is impossible.

The essential error in the position of the Government lies in the assumption that the effect of the opinion of the Supreme Court was to convert these condemnation proceedings back to simply technical processes for the perfection of title in a proceeding contemplated by the parties and within the terms of their contracts; or, stated in another way, to convert these proceedings into an identity with an action in the Court of Claims for specific performance of a contract. This argument erroneously assumes, first, that the Supreme Court had the power and desire to restore the status quo ante; secondly, that by striving and prevailing for the prices promised them by their Government (in the adversary proceeding forced upon them) these landowners somehow bound themselves to all the concomitants of a discarded contract procedure and simply turned back the clock some years, thereby wiping out all that had intervened; and, thirdly, that there is something inconsistent in allowing the landowners their promised price as a matter of equity and also giving them the benefits arising solely by statute from a method of procedure which was forced upon them by the Government. The reasons why the prices provided in the options were compulsorily imposed upon the Government by the Courts are that it was felt unconscionable and contrary to public interest to allow the Government, after accepting unusual benefits, to renege on its solemn word, and justice [fol. 64] demanded that the landowners be given by way of ascertainment of value in condemnation that which they would have received had not the Government breached the contracts. In other words, there is actually nothing in the record of this case to show that the contracts per se

were to be enforced. The Government was merely allowed to follow its chosen and elected course subject only to the duty to give the promised price. Any concomitants arising, however, from that elected course (i.e., interest) were not negatived or touched upon. Since, therefore, the Government has elected its remedy of condemnation, this Court can see no valid distinction between these proceedings and any others, unless there is something in the record to show that the landowners here have waived a right that they might have otherwise possessed. The Court will next address itself to that question.

The option contracts involved in these cases can be the only evidence of any such waivers or elections; and the Government here makes no contention that any circumstances other than those contracts constitute any such waivers or agreements. Thus, the question simply is, did the landowners by entering into such option contracts thereby stipulate and agree that no matter what happened the sums therein specified should be the total compensation for their lands? This Court, in answer to that question, can find nothing on the face of those option contracts, or from the surrounding circumstances, to indicate any such intention on the part of the landowners, or, for that matter, the Government. Had the contracts been performed, either by conveyancing or by a friendly condemnation proceeding, as provided in the options, the argument advanced by the Government might have strength. But, as it was, the parties were contracting for the sale of their land and they naturally made no provision for interest. [fol. 65] Had the contracts been performed in the manner contemplated on their face they would have needed no interest and been entitled to none. However, those contracts were not executed and never will be. How, therefore, can it be said that agreements to take no interest under the condemnation statutes can be found in contracts whose subject matter was something totally different than the proceeding that was subsequently brought? At the time the option contracts were executed the present proceedings were certainly not in the minds of any of the parties, and their possibility is no where reflected in these contracts. The landowners stated what they would take for their land in certain eventualities, which eventualities

were the delivery of deeds in return for money (or, a friendly title clearing condemnation in a certain event). Neither of these eventualities ever occurred, but a totally different, completely [unforseen] and most unwelcome litigation was commenced. The general law of contracts would certainly forbid a holding which bound a contracting party by an instrument the subject matter of which was entirely different. The Government not the landowners, breached the contract, and that contract is dead and will never be performed except that the landowners, by reason of the final holding of the Supreme Court of the United States, will be put in a monetary way in the same position as if the contracts had been executed. The question of interest in this adversary condemnation proceeding is not within the four corners of the contract at all, and is to be determined by operation of law.

Argument has been presented in behalf of the landowners that even if the option contracts could have some relevancy to the question of interest under the condemnation statute, that they have relevancy only to the extent that in condemnation they show an intent to fix the value of the land but not the total compensation therefor. This [fol. 66] argument is based on the contention that there is a difference in condemnation between the words "value" and "compensation", and that the word "compensation" includes not only the value found by the trier of the facts but also any additional items required by law, such as the statutory interest. A decision on this problem, in view of the preceding statements of this opinion is, of course, not necessary, since the Court has already decided that the contracts have no bearing at all on the interest question. However, the Court wishes to point out that it is in agreement with this contention insofar as it believes that if by any stretch of the imagination it can be held that the parties were contracting in contemplation of an adversary proceeding in condemnation, then they were contracting only to the extent that they were fixing the value of the land in the same manner that Commissioners or a Jury would fix the same, and without any stipulation to cover the entire condemnation proceeding (includ-

ing matters like interest, which are handled by operation of the Statute). The option contracts, when they speak of the contemplated friendly condemnation to clear title, provide for "a consent verdict fixing the award at the agreed value". They further provide for an immediate deposit of that valuation. Certainly, under the terms of the Statute where the Government agrees to and does deposit an agreed valuation there can be no question of interest. With this in mind the landowners' agreement to a value would have constituted their entire compensation because of the contemporaneous agreement of the Government to instantaneously pay in that value and cut off the right to interest. Nowhere, however, can words be found that show a contemplation by the landowners that they are fixing the possible total compensation that they would take in condemnation regardless of whether the Government, in accordance with its mutually dependent promise, paid in the money subject to the landowners right of user.

[fol. 67] It should be noted, before turning to a consideration of the remaining stated issues, that the Court has found, after consideration of the various authorities cited, no binding authority on the previously discussed issues, and feels that in its decision interpreting the Statute under the facts the court must and is at liberty to arrive at its conclusions independently. All of the authorities cited by the Government to the effect that interest is generally not allowable against the United States, except where contract or statute so provides, are of interest, but actually of no assistance to the Court in the cases at bar.

The only authorities relied on by the Plaintiff that the Court has found to even touch upon the propositions here are United States vs. 3.25 Acres of Land in Seneca County, New York, 53 F. Supp. 884, and United States vs. Certain Lands in St. Louis, 58 F. Supp. 305, both District Court cases, and the latter decided by Judge Duncan of this District. Although neither is in any way decisive, since their special applicability has been strongly urged, a statement of the Court's views on them is made necessary.

The Court believes that the issues involved in the case before Judge Duncan were not at all the same as those

here presented and that that case is so distinguishable as to be of no value as even influential authority. That suit was begun as an ordinary adversary condemnation, but while pending a proposition was made by the owner of the land for settlement of the case. A settlement was agreed upon, accepted, and a judgment rendered for the exact amount of the contract. A motion was filed by the landowners asking for interest from the time of the entry of judgment until payment, on the theory that the Government had unreasonably delayed the payment. Interest was denied by the Court. First, it should be noted that the interest question arose from a demand for interest after entry of judgment, and not before. Second, the [fol. 68] contract, in the form an accepted offer of settlement filed in the case, provided that—

"The consideration hereinabove set forth shall be the amount of the award to be decreed for all damages and compensation by reason of the taking of said lands by such judicial proceedings and we hereby agree that this offer to sell, if accepted, shall, without more, constitute a stipulation, which may be filed in said suit as final and binding evidence of the award to be made in such proceedings and paid into Court for the benefit of all persons entitled thereto."

Thus, when the contract was made, an adversary proceeding was not only in mind but was actually the subject matter of the contract. That contract was a compromise, and that with which they were dealing was well within the minds of the landowners. If they agreed to accept the sum named in the settlement for "all damages and compensation" they would certainly be presumed to include in their computations of what they would take not only the original value of the land but any other claims they might have had to that date against the Government, such as interest (or compensation for the deprivation of use pendente lite). L. C. 307, Judge Duncan states:

"The difficulty with defendant's position is that by its own action it removed itself from the provisions of the statute. If this statute were applicable here defendant would be entitled to interest on $35,000 from the date of taking on June 19, 1939, until the date of the payment,

August 14, 1944, but defendant makes no such claim. On the contrary, it bases its claim upon the ground of unreasonable delay in the payment of the amount agreed upon, and for which judgment was entered. It could make no other claim in view of the clear, unambiguous statement in its offer that: "*** the amount of the award to be decreed for all damages and compensation by reason of the taking of said land***. (Emphasis supplied)

From this language it must be determined that the defendant's offer was a full and complete offer, not one fixing an amount as of the time of taking, but as of the time of the acceptance and payment."

From the above quotation it can be clearly seen that the [fol. 69] real basis of decision was a finding of fact that the landowners had voluntarily given up and waived any right they had, and that is just exactly what this Court finds that the landowners in the cases at bar did not do. There is no difference to be found in that opinion as to the law, there is simply a factual situation not here present. It should also be noted about that case, that there the landowners did not petition clearly for interest under the statute, but went outside of it relying on alleged unreasonable delay, and, as before noted, it is clearly the law that no matter how arbitrary or unreasonable the delay and how great the hardship imposed, the United States may not be forced to pay interest absent a statute or contract providing therefor. That case was decided on its facts, and the facts in the cases at bar are in no way identical.

The other District Court case, United States vs. Certain Lands in Seneca County, New York, supra, may be more in point, it is true, but still is essentially distinguishable from the cases at bar for the same reason as Judge Duncan's opinion. Although the exact fact situation present in that case is not made clear by the opinion, it should be noted that Judge Burke seemed to be of the very definite view that that proceeding was brought completely within the terms of the option contract, and not, as in the cases at bar, in derogation and denial of those contracts. The option provided, as here, for friendly condemnation to clear title

and although the opinion does not show the Government's motive in bringing the matter to Court, surely it must be presumed, since Judge Burke seems to so imply, that the action was brought within the rights given by the contract. All through the opinion appears the assumption that a proceeding contemplated by the option had occurred and that, therefore, the contract should bind. This is best illustrated [fol. 70] by the very words of the Court, l. c. 885:

"By agreement of the parties, therefore, it was left to the determination of the United States, through its officers in charge of the matter, to determine, notwithstanding the prior acceptance of the option, whether the title was unsatisfactory for purchase by deed. By express agreement the Government had the right, at its election, to acquire title by condemnation and the church agreed in that event to cooperate to that end and the option price was to constitute conclusive evidence of the true value of the whole property. When reasonably and fairly exercised, as it appears to have been in the light of the matters set forth in the motion papers, the determination to acquire title by condemnation is not open to question and when resorted to, the express agreement of the parties as to compensation must control. That agreement was that the option price 'shall be final and conclusive evidence of the true value of the whole of said property and of the proper award to be made in such proceedings'. The possibility of the Government electing to acquire title by condemnation was not an unforseen circumstance and in such event, that there would be some delay in the proceedings might reasonably have been inferred. The option, however, contained no provision for adding anything to the award to compensate for delay in the payment of compensation. The Court may not supply what the parties themselves have failed to include in the agreement." (Emphasis the Court's)

That being the situation, the case can give no assistance where, as here, the Government itself departs from the contract, and makes its performance impossible, and does not exercise any contract right, in the words of Judge Burke, "Reasonably and fairly".

Attempts have been made to show guiding principles in the Supreme Court opinion in Muschany vs. United States,

supra. The Court, however, can find no guidance therefrom and is certain that any language of the Supreme Court that has been used by either of the parties to this suit to justify their conclusions is not pertinent, since it is only too clear that Supreme Court of the United States was in no manner addressing itself to the issues now raised by these motions.

[fol. 71] Since the submission and briefing of these motions this Court's attention has been directed by defendants to the decision of the United States Circuit Court of Appeals for the Fifth Circuit in U. S. vs. Marion Baugh, et al., ... F. 2d....., decided May 4, 1945. As in Judge Duncan's opinion in US vs. Certain Lands in St. Louis, supra, the suit was commenced as an ordinary condemnation and a stipulation was subsequently filed. The Fifth Circuit held that the landowners were entitled to interest from the filing of the stipulation until deposit. US vs. Baugh, et al., is of interest not because it necessarily expressly rules the issues here, but because it contains thought closely allied to this Court's holding. The stipulations there waived hearing before commissioners, consented to decrees vesting title, and agreed that certain sums be adjudged as just compensation. They further read:

"The foregoing stipulation is made to expedite the vesting of title in the plaintiff, the United States of America, and the payment of just compensation for such lands to the owners thereof, and it is the purpose and intent hereof to vest in the Court, without any further proceeding and notice, full authority to close such action by final judgment and to disburse the funds in accordance therewith."

After the filing of these stipulations an eight month's delay ensued before deposit by the government, although possession had been taken when suit was commenced. Judge Waller discusses the effect of these stipulations, l. c. ....., and the quotation suffices to illustrate the analogous reasoning to this court's:

"In the present case the government did not take a deed from the landowner as in an outright purchase, but it acquired title and possession by condemnation. The stipulation merely had the effect of relieving the government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might

be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the stipulations that in-
[fol. 72] terest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner impliedly waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights." (Emphasis the Court's)

Again, the learned Judge said, l. c.....:

"But the government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract.

The Constitution no more permits the deprivation of money without just compensation than it does the deprivation of the use of land without just compensation." (Emphasis the Court's)

Although the facts are different, the case is sound authority for this Court's holding that where a contract fixes the value of the land, the presence of such contract does not affect the matter of interest, which is governed by operation of law.

It is further of interest to note that the Court in US vs. Baugh, states, l. c.....:

"The settled law of the land at the time a contract is made is a part of the contract and must be read into it."

This is in direct answer to the plaintiff's underlying argument in the cases at bar that the contract upon which an award is based must provide for interest for it to be allowable. It would seem, however, that the rule is, to the con-

trary, that a contract is presumably made in view of the law existing (which gives a right to interest) and if this presumption is to be altered, the contract must so provide.

[fol. 73] The third issue, as above stated, is whether, having decided that the landowners are entitled to interest, they are entitled to interest from the date of actual taking of the land, or from the date of the filing of the declaration of taking in this Court. Here, it is the Court's opinion, that the latter date must govern. Although it is true that the Government went into possession of these lands sometime prior to filing of these condemnation suits, and withheld the use of the land from the landowners during that intervening period, it is also true that the right in the landowners to interest now is bottomed upon the Statute. This Statue is in derogation of the general rule that no interest is allowable against the sovereign, and strict conformity must, therefore, be required in the application of the exception to these cases. For any loss of the use of their lands after the actual taking but prior to the filing of the declaration of taking, the landowners right lies outside of the condemnation laws and in contract, and they must, therefore, go uncompensated in the same manner that persons dealing with the sovereign in matters other than condemnation receive no interest.

Finally, considering the fourth issue, it has been argued that since the original decrees, entered in the Muschany and the Andrews cases (those appealed to the Supreme Court), provided a judgment for the principal amount of the options plus interest, and since those decrees have been affirmed by the Supreme Court of the United States, that the question of interest is res adjudicata in these cases at least. Additionally, it is argued in this line, that those decrees form influential or binding precedent for all of the other cases and that, further, because of some commitment by counsel for the Government the landowners in the other cases are en- [fol. 74] titled to the same treatment in all respects as Muschany and Andrews.

The question of whether interest is res adjudicata in the Andrews and Muschany cases depends essentially on whether those decrees were, in the form written, affirmed by the Supreme Court, or whether they were made subject to re-

vision or re-entry. The Circuit Court of Appeals, of course, reversed the findings and decrees in those cases, which would have the effect of setting the said aside. The Supreme Court, however, reversed the Court of Appeals and in its mandate ordered that the Muschany and Andrews cases be remanded to the District Court for further proceedings in accordance with its opinion. Although it is true that the Supreme Court did not expressly state that the decrees in the form written were affirmed, it appears that such is the undoubted effect. A reversal of the Court of Appeals must, of necessity, reinstate the rule of the District Court if nothing more is done. The order of the Supreme Court, remanding to the District Court for further proceedings in accordance with its opinion, can only mean that since the opinion was in accord with the District Court that the latter court should proceed as it had been proceeding prior to appeal. Although the language of the Supreme Court's mandate may not be expressly an affirmance, it cannot be interpreted in any other way, since there are no further proceedings to be had other than execution of the judgments previously entered.

The Court recognizes, however, that the issue of interest was not raised before either of the appellate courts, and that neither opinion adjudicates that question. However, that is not the fault of the landowners since the original decrees gave them interest, and those decrees became final unless attacked and set aside on appeal. In view of the Court's [fol. 75] holding on the other issues previously discussed in this opinion, a decision of the present issue is, of course, not necessary in order to hold with the landowners. However, the Court feels that so far as the Andrews and Muschany cases are concerned justice requires that the landowners be given the benefit of the Government's failure to seek reversal of the decrees already entered in their favor. The Government, it appears to this Court, participated in an appeal through two courts, alleging error committed by this court. The question of interest was squarely present in the record and the Government could have attacked that during the same appeals. Now, however, having been defeated on the question of the validity of the option contracts the Government seeks to pick another point in the original decrees which it believes erroneous and attack the landown-

ers on that. Such procedure certainly is violative of all tenets of appellate procedure.

As for the effect of this upon the other cases in which no decrees were entered, it certainly cannot be said that the opinions of the Supreme Court in the Muschany and Andrews cases form any precedent on the interest question. The issue of the interest awards not having been attacked on appeal, and the opinions of both the Court of Appeals and the Supreme Court being absolutely silent thereon, it would, indeed, be erroneous to say that because the Government neglected to allege an error and obtain a decision on the interest provisions in the Muschany and Andrews decrees that they have thereby made binding or even influential law for other cases.

However, aside from that question, there is the suggested commitment of the Government, which would cause all other cases to follow the exact result of the Andrews and Muschany cases. This Court feels that in all probability good conscience might dictate that all landowners should be given the same treatment as those in the test cases, since they [fol. 76] doubtless failed to press their cases to judgment in reliance on an assumption that all cases would result identically. However, the Court further feels that no agreement by the Government intended to cover the question of interest has been shown and is, therefore, not disposed to hold that the Government is bound in that regard. Adequate reasons have been stated elsewhere in this opinion for allowing interest to all landowners, and the Court, therefore, must rule this issue as to all landowners other than Muschany and Andrews against the defendants.

In conclusion, therefore, the Court is of the opinion that the landowners are entitled to entry of judgments which shall include interest upon the deficiencies in their awards from the dates of the filing of the declarations of taking in these cases. The Court is duly appreciative of the position of the Government and the vigilance of its officers in protecting its rights. Great skill and diligence has been exercised by those agents, and the Court believes that their efforts were certainly not unreasonable in light of the contrary opinions arrived at by the various jurists to whom the issues have so far been presented. However, the Court feels

that the landowners, within the spirit of the Fifth Amendment of the Constitution of the United States, are entitled to a just compensation for their lands, and that that includes the right to receive as additional compensation the interest granted by the Statute for their loss of the use of their land, or the use of their money, during the long period when the officers of the Government were attempting to diminish the amounts to be paid to them. As already stated, it appears to this Court that these landowners so clearly come within [fol. 77] the class intended by Congress to be benefited by the Statute, that, although the Government's earnest attempts to obtain reversals were in the best of faith, the landowners should not be made to suffer because of those attempts.

Wherefore, the Court directs that in accordance with this opinion drafts of judgments carrying interest on the undeposited deficiencies from the filing of declarations of taking be presented in all of the above styled cases, except the Muschany and Andrews cases in which decrees have already been entered, and that, also, orders ruling the numerous motions and counter-motions be supplied. Upon submission for approval and settlement of the same appropriate orders and decrees will be entered.

GEO. H. MOORE,
United States District Judge.

Dated this 8th day of June, 1945.

[fol. 78] Findings and Judgment

(Filed June 30, 1945.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 997. vs. At Law.
215.494 Acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al., Defendants.

Now on this day, the Court having heretofore heard a motion filed by plaintiff for judgment for plaintiff in condemnation and for defendants fixing the compensation to

be paid by plaintiff to the defendants in the sum of $35,000.00, the price agreed upon in the "option contract" referred to and set out in the answer filed by defendants herein, without interest, and the answer thereto filed by defendants Dennis B. Pitman and May Dell Pitman, wife of said Dennis B. Pitman, and the counter-motion of said last named defendants for judgment with interest, and evidence having been heard, and arguments of counsel having been made, and said motions having been taken under advisement, and the Court being now fully advised in the premises, doth find:

That the United States of America is plaintiff and the following named parties are defendants in this action:

Dennis B. Pitman,
May Dell Pitman, wife of Dennis B. Pitman,
John Paul, Trustee,
John Salfen,
Collector of Revenue of St. Charles County, Missouri,
St. Charles County, Missouri
S. Brooks Remmington, and
The Bank of Dutzow.

That this is a proceeding in condemnation, instituted on the 19th day of June, 1941, by the United States of America to condemn the land hereinafter described, as in such [fol. 79] cases made and provided by the laws of the United States of America, and in which there was filed a Declaration of Taking as provided for by Title 40 United States Code, Section 258a.

That all of the defendants have been duly served with process as required by law, or have duly entered their appearance herein; and that this Court has jurisdiction of the subject-matter of this cause and of all the parties hereto.

That prior to the filing of plaintiff's petition herein and prior to any proceeding in connection therewith, including the filing of said Declaration of Taking, defendants Dennis B. Pitmann and May Dell Pitman, wife of said Dennis B. Pitman, and plaintiff, through the War Department of the United States, entered into a contract in writing, sometimes referred to as an "option contract," a copy whereof was

annexed to and filed with the answer of the last named defendants in this cause, which contract was accepted by plaintiff in accordance with the terms thereof, and has been introduced in evidence in this cause, by the terms of which contract plaintiff agreed to purchase and said last named defendants agreed to sell to plaintiff, for the price and sum of $35,000.00, the said land hereinafter described.

That said defendants Dennis B. Pitman and May Dell Pitman, wife of said Dennis B. Pitman, were at the time of the execution of said option contract, and at the time of filing of said Declaration of Taking, the owners in fee simple of said land hereinafter described.

That, upon the acceptance by plaintiff of said option contract, on or about the 14th day of November, 1940, possession of said land hereinafter described was taken by and has ever since been in plaintiff, the United States of America.

That, since the institution of this proceeding and the filing of said Declaration of Taking, the Supreme Court of the United States has held binding on the parties thereto, insofar as concerns the worth or value of the land at the time of the taking by the United States of America, an option contract for the sale of land, the provisions whereof and the circumstances surrounding the execution [fol. 80] of which, are the same as the option contract aforesaid executed by plaintiff and said defendants, Dennis B. Pitman and May Dell Pitman, wife of said Dennis B. Pitman, except as to dates, the names of the landowners, the description of the property and the sale price; and that, under the aforesaid decision of the Supreme Court of the United States and the provisions of said option contract executed by plaintiff and the last named defendants, the said sum of $35,000.00 was and is, in this proceeding, the agreed value or worth of the land hereinafter described at the time of the taking thereof by plaintiff, and said defendant landowners became and were entitled to have the value or worth of said land fixed in this proceeding at said agreed value, as of the date of the taking thereof.

That on the 19th day of June, 1941, plaintiff caused to be filed in this cause by Henry L. Stimson, Secretary of

War of the United States, the aforesaid Declaration of Taking of the land therein and hereinafter described and on said day caused to be entered in this cause a Judgment of Taking on said Declaration of Taking, whereby the fee simple title to said land became fully vested in the United States of America, plaintiff herein, and the title to and possession of said land was then and has ever since been in the plaintiff, United States of America, and none of the defendants has since had any right, title or interest in or to the same.

That at the time of the filing of said Declaration of Taking, on June 19, 1941, there was deposited by plaintiff in the registry of this Court the sum of $14,600.00 as the then estimated compensation stated in said Declaration of Taking for the appropriation and taking by plaintiff of the fee simple title to the land in said Declaration of Taking and hereinafter described, but that said deposit was erroneous and insufficient in amount in that the same failed to equal said agreed value or worth of said land as of the date of the taking and appropriation thereof by plaintiff. [fol. 81] That on the 23rd day of October, 1942, an order for provisional disbursement was entered herein by virtue whereof the entire amount theretofore paid by plaintiff into the registry of the Court as aforesaid, to-wit, $14,600.00, was disbursed, leaving nothing in the registry of the Court in this cause.

That on the 17th day of May, 1945, there was deposited in the registry of this Court by plaintiff an additional sum of $20,400.00 as additional compensation for the taking and appropriation by plaintiff of the fee simple title to the land in said Declaration of Taking and hereinafter described.

That the combined deposits heretofore made by plaintiff into the registry of this Court in this cause as aforesaid were and are erroneous and insufficient in amount and did not and do not constitute just compensation for the taking of said lands hereinafter described, in that plaintiff, in making said deposit of May 17, 1945, failed to include therein interest on said sum of $20,400.00 which plaintiff had theretofore withheld from the registry of the Court as aforesaid, at the rate of six per cent, per annum

from the time of the filing of said Declaration of Taking, to-wit, the 19th day of June, 1941, until said 17th day of May, 1945, which interest defendant landowners were and are lawfully entitled to receive as a part of the just compensation to which they were and are entitled for the taking and appropriation by plaintiff of the land hereinafter described.

That plaintiff's petition and the proceedings in this cause set forth a cause of action for the condemnation, appropriation and acquisition by plaintiff, by proceedings in condemnation, of the fee simple title to the land hereinafter described, which land was and is necessary to provide for the establishment of an ordnance plant for the national defense of the United States of America and for other military use incidental thereto in connection with the Weldon Springs Ordnance Plant; and that the award-
[fol. 82] ing to plaintiff of a judgment in condemnation, and the awarding to the defendant landowners of full, just compensation for said land, in this condemnation proceeding, will confirm and perfect in plantiff, finally and completely, the fee simple title to the land hereinafter described, in conformity with the laws of the United States of America.

That the land described in plaintiff's petition is the land described in said Declaration of Taking referred to herein, and is bounded, defined and described as follows:

Tract No. 18-A containing 215.494 acres of land, more or less, situate in St. Charles County, Missouri, and more particularly described as follows:

Parcel 1.

A tract of land in Sections 24 and 19, Township 45 North, Ranges 2 East and 3 East, containing 30 acres, more or less, being part of Lot No. 3 as designated and described in the agreed partition of the real estate of James F. Howell, deceased, dated March 29, 1854, and recorded in Book "B" No. 2 pages 450 and following, of Recorder's Office, St. Charles County, Mo., being the remaining portion of said Lot No. 3 after deducting the public road which runs through said Lot No. 3 and 40 acres off the West side thereof conveyed to H. B. Castlio and Mitchell Castlio as

per deeds recorded in Book 45, page 209 and Book 38, page 108, and 50 acres conveyed to Boyd Keitel by Dennis B. Pitman as per deed recorded in Book 179, Page 65, said 30 acre tract being more particularly described as follows: Beginning at the northeastern most corner of said Lot No. 3, a point; thence South 7½ degrees West 16.80 chains; thence North 82½ degrees West 18.00 chains; thence North 7½ degrees East 16.80 chains; thence South 82½ degrees East 18.00 chains to the point of beginning, said land being situated in St. Charles County, Missouri, and containing 30.0 acres, more or less.

Parcel 2.

All of the fractional NE¼ of Section 36, Township 46 North, Range 2 East, lying West of the West line of U. S. Survey 1798, excepting therefrom a tract of land containing 11.58 acres in the Northwest corner thereof described as beginning at the Northwest corner of the NE¼ of said Section 36, thence East 10.94 chains; thence South 10.36 chains; thence West 10.94 chains; thence North 10.36 chains to the point of beginning; said tract containing 73.03 acres, more or less.

Parcel 3.

Also part of U. S. Survey No. 1798, in Township 46, North, Range 2 and 3 East, bounded and more particularly described as follows: Beginning at a rock in the West line of said Survey 1798, which is South 7½ degrees West 35.00 chains from the Northwest corner of said Survey, thence South 82½ degrees East 19.05 chains to corner, a rock, thence South 7½ degrees West 17.41 ⅔ chains to corner a rock; thence North 82½ degrees West 19.05 chains to point on West line of Survey 1798, thence along said West line of Survey 1798 North 7½ degrees East 17.50 chains to place of beginning, containing 33⅓ acres, more or less.

[fol. 83] Parcel 4.

A tract of land located in the Keitel tract of Lot No. 3 between the Francis Howell Cemetery and the Pitman road in U. S. Survey No. 887, being more particularly described as follows: Beginning at the Southeast corner of the Francis Howell Cemetery; thence East 75 feet to the West line of the Pitman road; thence North along said

line a distance of 84 feet to a point; thence West 75 feet to the East line of said Cemetery; thence South along said line 84 feet to the point of beginning, said land being located in St. Charles County, Missouri, and containing .144 acres, more or less.

Parcel 5.

A tract of land containing 9.67 acres, being part of the W½ of the NW¼ of Section 6, Township 45 North, Range 3 East, more particularly described as follows to-wit: Beginning in the South line of the Marthasville Road at a rock in the Township line, which rock is distant East 4.38 Chains from another rock in the South line of said road set in the Range line, at or near, the Northwest corner of said Section 6, Township 45 North, Range 3 East; thence from said beginning point South 3 degrees 30 minutes East along the land once of J. L. Schenningmann 40.82 chains to the East and West middle line of Section 6, an old stone in said line, from which a Black Walnut bears North 33¼, West 32 links and a Hickory 8 inches in diameter bears South 89, East 39 links; thence with said line of said Section West 2.37½ chains to a stake; thence North 3 degrees 30 minutes West parallel with the first course along the land once of Edw. Berghaus 40.82 chains to a stake in the South line of the Marthasville road; thence East with the south line of said road 2.37½ Chains to the point of beginning, containing 9.67 acres.

Parcel 6.

Part of the Southwest fractional quarter of Section 27, Township 46 North, Range 2 East, bounded and more particularly described as follows: Beginning at the southwest corner of said Section 27, a rock, from which a black oak 16 inches in diameter bears South 54 degrees West distant 29 links and a white oak 8 inches in diameter bears North 85 degrees West distant 25 links; thence North along the West line of said section 17 chains 90 links to corner, a rock, from which a black oak 12 inches in diameter bears North 30 degrees East distant 17 links and a white oak 4 inches in diameter bears South 13 degrees East distant 22 links; thence South 40¾ degrees East

along the land once of Hy Boerding 24 chains 9 links to corner, a rock, on the section line between Sections 27 and 34 of said township and range; thence West 16 chains to the place of beginning, containing 14.32 acres, more or less, and being the same tract of land conveyed by John W. Callison and wife to Nancy E. Callison as per Warranty Deed dated August 3, 1926, and recorded in the Recorder's Office in Book 154 at Page 332.

Parcel 7.

A tract of land situated in U. S. Survey No. 1641, Township 46 North, Range 2 East, described as follows: Beginning at a point in the center of Dardenne Creek distant North 80 degrees 09 minutes East 13.40 chains and North 9 degrees 14 minutes West 21.37 chains from the most northeasterly corner of U. S. Survey No. 280; thence along the land once of Julia Castlio South 9 degrees 14 minutes East 21.37 chains to a stone in the southern line of said U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280; thence along the [fol. 84] southern line of said U. S. Survey No. 1641 North 80 degrees 09 minutes East 21.73 chains to an old stone; thence North 9 degrees 00 minutes West along the land once of Schneider 5.75 chains to a point in the center line of Dardenne Creek; thence northwestwardly along the center line of Dardenne Creek, as now located, to the place of beginning, containing 35 acres, more or less.

A tract of land situated in fractional Section 24, Township 46 North, Range 2 East, described as follows: Beginning at a stone, in the Southern Line of U. S. Survey No. 1641, which stone is distant 13.40 chains North 80 degrees 09 minutes East from the northeastern corner of U. S. Survey No. 280 and from which stone a Black Walnut 30 inches bears North 9 degrees 00 minutes West 51½ links; thence South 9 degrees 14 minutes East along the land once of O. W. Fosher 10.80 chains to an iron rod; thence North 80 degrees 09 minutes East along the land once of O. W. Fosher 17.62 chains to the center line of the former Pitman private road, 16 feet wide; thence North 0 degrees 19 minutes East 11.18 chains to a stone in the southern line of U. S. Survey No. 1641; thence along

said Survey line South 80 degrees 09 minutes West 19.44 chains to the place of beginning, containing 20 acres.

All of the above described land being situated in St. Charles County, Missouri, and containing in all 215.494 acres, more or less.

Subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

That plaintiff's said motion for judgment should be sustained in part, but should be denied insofar as plaintiff thereby seeks to prevent said defendant landowners from receiving any interest as a part of the full, just compensation to be allowed them for the taking and appropriation of said land.

That defendant landowners' said counter-motion for judgment fixing the compensation to be paid by plaintiff for the taking of said land at $35,000.00 plus interest at six per cent. per annum on said sum of $20,400.00 from June 19, 1941, until the payment thereof into the registry of the Court should be sustained.

Now, Therefore, in accordance with the above findings, it is Ordered, Adjudged and Decreed that:

(1) Plaintiff, United States of America, by virtue of this proceeding, is awarded judgment in condemnation against the said premises in plaintiff's petition and hereinabove described, for the purposes herein defined and specified, and against the defendants herein, and each and all of them, jointly and severally, as their title and rights may appear, and that the title in fee simple to said premises, subject to all existing highway and public utility ease- [fol. 85] ments, but including the fee underlying such existing easements, is vested in the plaintiff, United States of America, and has been vested in plaintiff, the United States of America, upon and since the filing of said Declaration of Taking, and the defendants, and each and all of them, jointly and severally, are divested of any and all right, title, interest and claim, of every nature and description, in or to the land above described.

(2) That in accordance with the option contract executed by plaintiff, United States of America, and said defendant landowners, and accepted by plaintiff, the defendant landowners are entitled to and there is awarded to them the sum of $35,000.00 as and for the agreed value or worth of said land, as of the date of the filing of said Declaration of Taking herein, together with interest on $20,400.00 of said sum, at the rate of six per cent. per annum, from the 19th day of June, 1941, until the 17th day of May, 1945, which said sum of $35,000.00 and said interest constitute the full, just compensation to which defendant landowners, and any and all other persons who may be found entitled thereto claiming by, through or under them, are entitled in this cause for said land.

(3) That plaintiff shall forthwith pay into the registry of this Court the sum of $4787.20, being the equivalent of six per cent. interest on said sum of $20,400.00 from the 19th day of June, 1941, to the 17th day of May, 1945, as that part of the just compensation to which defendant landowners are entitled for the taking and appropriation by plaintiff of said land hereinabove described and which has not been heretofore deposited in the regisistry of this Court by plaintiff, which sum of $4787.20, together with said sum of $20,400.00 deposited by plaintiff in the registry of the Court on said 17th day of May, 1945, shall repose in the registry of this Court for the use and benefit of said defendant landowners, and other [fol. 85A] defendants claiming an interest therein by and through said defendant landowners, and for disposition in the way, manner and proportion as this Court shall hereafter order, adjudge and decree.

(4) That this cause shall be held open for entry of such other and further orders and decrees as may be meet and just in the premises.

Dated this 30th day of June, 1945.

GEO. H. MOORE,
District Judge.

[fol. 86] (Motion of Plaintiff for New Trial.)

(Filed July 7, 1945.)

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial for the following reasons:

1. The Court erred in holding that this is an adversary condemnation proceeding;

2. The Court erred in not holding that this is a friendly condemnation proceeding according to the terms and provisions of the option-contract;

3. The Court erred in not holding that the filing of the equitable answer by the property owners converted this condemnation proceeding into an equitable action for the enforcement of the option-contract;

4. The Court erred in holding that this condemnation proceeding differs in no respect from any other condemnation proceeding except in the method of ascertaining the value of the land;

5. The Court erred in not holding that the equitable answer filed by the property owners in this case and the decision of the Supreme Court of the United States upholding the validity of the option-contract and the allegations of the equitable answer took the case out of the operation of the Declaration of Taking part of this condemnation proceeding;

[fol. 87] 6. The Court erred in holding that there was an ascertainment of the value of the land in this proceeding, for it has never been ascertained by this Court nor by any Appellate Court;

7. The Court erred in not holding that the compensation was not ascertained in this proceeding but that on the contrary it was fixed by the option-contract and the opinion of the Supreme Court of the United States holding such option-contract to be valid and binding upon the plaintiff;

8. The Court erred in its construction of the option-contract;

9. The Court erred in holding that the amount mentioned in the option-contract was the fair market value of the land involved in this case at the time of the filing of the Declaration of Taking in this case;

10. The Court erred in not holding that the sum mentioned in the option-contract is the full compensation to which the property owners are entitled in this proceeding;

11. The Court erred in its definition as to what constitutes just compensation;

12. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty to be paid by the plaintiff for its failure to perform the conditions of the option-contract immediately after its acceptance by the Government;

13. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty against the Government for litigating the validity of the option-contract;

14. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty for the Government's delay in the payment of the amount mentioned in the option-contract when such delay was caused by the vigilance and diligence of plaintiff's Officers and Attorneys in litigating the validity of the option-contract, and with the acquiescence of the defendant property owners;

[fol. 88] 15. The Court erred in adding interest to the amount mentioned in the option-contract as a penalty without citing some statute authorizing such penalty;

16. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to promptly perform and fulfill the provisions and conditions of the option-contract;

17. The Court erred in adding interest to the amount mentioned in the option-contract as liquidated damages to the property owners for the failure of the Government to fully and completely perform and fulfill the provisions and conditions of the option-contract;

18. The Court erred in its construction of the opinion of the Supreme Court of the United States in the Andrews and Muschany cases;

19. The Court erred in not holding that the Supreme Court of the United States held that the amount mentioned in the option-contract was full and complete compensation when the Supreme Court said:

"The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this offer, agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses . . . The Government knew the total cost when it became bound on the contract." (emphasis added)

20. The Court erred in holding that the burden of proof is upon the Government to show the absence of any contract obligation to pay interest or any statute providing for interest;

21. The Court erred in not holding that the burden of proof is upon the property owners to point out the exact provision of the contract providing for interest or to point out the exact provision of the statute providing for interest and a full compliance by the property owners with such statute;

[fol. 89] 22. The Court erred in allowing interest upon any part of the amount mentioned in the option-contract and for any period of time;

23. The decision of the judgment now entered is contrary to the views of the Court when the question of the option was first presented to the Court in the Muschany and Andrews cases when the District Courts held in the Findings of Fact and Conclusions of Law that the property owners were entitled to recover only the principal amount named in the option without interest;

24. That as the Supreme Court, the Court of Appeals and the District Court all held in passing on the McDowell option that the amount included therein included not only the value of the land but compensation to the title company,

compensation to McDowell by way of commission, and other expenses, to now allow interest on the entire sum to the property owners would be to allow him interest on not only the value of his land but also on other items which do not belong to him, but which, in truth and fact, are being paid by the Government and not by the property owners to the title company and to McDowell;

25. That by including all of these elements in the amount named in the option, as well as the value of the land, the parties conclusively show that they were considering the amount of the option to be the total and entire amount to be paid by the Government as full compensation for the land and the other elements named therein, and further show that it was the intention of the parties that the amount and no additions thereto by way of interest was to be paid by the Government;

26. That the Court erred in holding that the amount named in the option represented the value of the land in view of the holding of the Supreme Court that it did not represent that amount at all, but that it represened the agreed purchase price, and in view of the fact that the option contract itself repeatedly refers to it as the agreed pur-[fol. 90] chase price and not value;

27. That the position of the land owners in asking for interest under the Declaration of Taking Statute is inconsistent with their prior position heretofore asserted that they were entitled to have the option contract enforced as an option contract and that said contract not calling for interest, having failed to provide for the payment of interest, does not now entitle the landowners to interest in addition to the principal amount named therein;

28. The Court erred in finding that, upon the acceptance by the plaintiff of the said option-contract the possession of the land involved herein was taken by, and has ever since been in the plaintiff, the United States of America, because there was no evidence to sustain the said finding of fact;

29. The Court erred in not holding that the right to immediate possession of the land was included in the consideration mentioned in the option-contract and that such right of immediate possession was contracted for in the said

option-contract and that the payment of the consideration mentioned in the option-contract is full payment for the land herein involved and for the right to immediate possession thereof obtained by the plaintiff under such option-contract;

30. The Court erred in holding that there was a taking under the Declaration of Taking filed in this cause such as contemplated by the Declaration of Taking Statute because the right to possession of the property had theretofore been contracted for under the terms and provisions of the option-contract;

31. The Court erred in holding that the property owners are entitled to interest under the provisions of the Declaration of Taking Statute because there was no taking under the Declaration of Taking which could authorize the allowance of interest under such statute;

[fol. 91] 32. The Court erred in holding that there was an ascertainment of just compensation in this proceeding, such as is mentioned and contemplated in the Declaration of Taking Statute, in order to warrant the inclusion, as part of the just compensation awarded, of interest at the rate of 6% per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment, or upon such part of the amount finally awarded as was not deposited contemporaneously with the Declaration of Taking;

33. The Court erred in holding that the two deposits made in this case, the first with the Declaration of Taking and the second on May 17, 1945 were erroneous and insufficient in that they failed to include any interest;

34. The Court erred in its judgment and decree entered in this cause by adding interest at the rate of 6% per annum upon the deficiency or upon the difference between the amount deposited with the Declaration of Taking and the amount mentioned in the option-contract;

35. The Court erred in its judgment and decree entered in this cause by including interest at the rate of 6% per annum from the date of the Declaration of Taking in this cause to May 17, 1945 upon the amount deposited in the Registry of this Court on the said 17th day of May, 1945;

36. The Court erred in its judgment and decree entered in this cause by requiring the plaintiff to pay into the Registry of the Court forthwith a sum of money equivalent to 6% interest on the sum deposited in the Registry of this Court on May 17, 1945 from the date of the Declaration of Taking in this case to the date of said deposit on May 17, 1945 as a part of the just compensation to which the defendants are entitled for the taking of the lands involved in this cause;

[fol. 92] 37. The Court erred in its findings and in its judgment and decree in the computation of the amount of the interest adjudged to the defendants upon the deficiency from the date of the Declaration of Taking to May 17, 1945;

38. The Findings and Judgment entered in this cause are contrary to and against the evidence under the law, are contrary to and against the law under the evidence and are contrary to and against the law and the evidence;

Wherefore, Plaintiff moves the Court to set aside its Findings and Judgment entered in this cause and to grant plaintiff a new trial herein.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

M. WALKER COOPER,
Special Assistant, United States Attorney.

Dated this 7th day of July, 1945.

[fol. 92a] (Docket Entry of Submission and Overruling of Motion of Plaintiff for New Trial.)

November 21, 1945.

Motion of plaintiff for a new trial submitted by plaintiff, taken as submitted by defendants and overruled.

[fol. 93] Statement Of Points To Be Relied Upon On Appeal

(Filed December 7, 1945.)

In The United States District Court, Eastern District Of Missouri, Eastern Division.

United States Of America, Plaintiff,
Docket No. 997. vs. At Law.
215.494 Acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al., Defendants.

The United States of America, appellant in the above entitled case, states that the following points will be relied upon on the appeal:

1. The District Court erred in denying the plaintiff's motion for judgment fixing compensation in the amount of the option contract price, without interest.

2. The District Court erred in entering judgment with interest on $20,400.00, the difference between $35,000.00, the amount of the option contract price, and $14,600.00, the sum deposited with the Declaration of Taking, from June 19, 1941, the date of the filing of the Declaration of Taking, to May 17, 1945, the date of the deposit in court of such difference.

3. The District Court erred in overruling plaintiff's motion for a new trial.

Respectfully submitted,

HARRY C. BLANTON

Copy of the foregoing Statement mailed to opposing counsel, Mr. William H. Allen, 112 N. Fourth Street, St. Louis 2, Missouri, this 7th day of December, 1945.

HARRY C. BLANTON

[fol. 94] Designation of the Record on Appeal.

(Filed December 7, 1945.)

United States of America, Appellant in the above entitled cause, designates for inclusion in the Transcript of

the Record on Appeal the pleadings, proceedings and evidence as follows:

	Filed
(1) Petition in condemnation as amended by order of the Court on September 6, 1941 and as further amended on October 20, 1941	June 19, 1941
(2) Declaration of Taking in Cause No. 979, omitting therefrom all names from the caption excepting the defendants Dennis B. Pitman and May Dell Pitman, his wife and omitting from the paragraph describing the parcels of land in said Declaration all Parcels except Tract No. 18-A	June 16, 1941
(3) Order and Judgment vesting title in Plaintiff as to Tract No. 18-A and Order of Immediate Possession	June 19, 1941
(4) Order directing the transfer of the sum of $14,600.00 from Cause No. 979 to this cause for the use and benefit of the defendants in this cause	June 19, 1941
(5) Answer of defendants Dennis B. Pitman and May Dell Pitman to Plaintiff's petition	September 3, 1941
(6) Motion of Plaintiff for judgment in condemnation and for judgment for defendants fixing compensation by option-contract	April 17, 1945

[fol. 95]

(7) Order setting for hearing on May 7, 1945 Plaintiff's Motion for Judgment in condemnation	April 17, 1945

(8) Answer of defendants Dennis B. Pitman, et al., to Plaintiff's Motion for Judgment in Condemnation fixing compensation by the option-contract and counter motion of said defendants for Judgment with interest	May 4, 1945
(9) Receipt of the Clerk for $20,400.00 paid into the Registry of the Court	May 17, 1945
(10) Memorandum of Opinion of the Court finding issues in favor of defendants and against the Plaintiff	June 8, 1945
(11) Findings and Judgment	June 30, 1945
(12) Plaintiff's Motion for New Trial	July 7, 1945
(13) Docket entry of November 21, 1945 overruling Plaintiff's Motion for New Trial	
(14) Plaintiff's Notice of Appeal	November 23, 1945
(15) Appellant's Statement of Points	
(16) Clerk's docket entries	
(17) This Designation of the Record	
(18) All other pleadings and documents filed in connection with this appeal.	

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

M. WALKER COOPER,
Special Assistant United States Attorney.

Copy of the foregoing Designation of the Record on Appeal mailed to opposing counsel, Mr. William H. Allen, 112 N. Fourth Street, St. Louis 2, Missouri, this 7th day of December, 1945.

HARRY C. BLANTON.

[fol. 96] Clerk's Certificate.

United States of America,
Eastern Division of the
Eastern Judicial District
of Missouri.—ss.:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing to be a full, true and complete transcript (except in so far as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in case No. 997, wherein the United States of America is plaintiff-appellant and 215.494 acres of land, more or less, situate in St. Charles County, State of Missouri, Known as Tract No. 18-A, and Dennis B. Pitman, et al., are defendants-appellants, as fully as the same remains on file and of record in my office.

Seal
U. S. Dist. Court
East. Div. of the
East. Jud. Dist. of
Missouri

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, State of Missouri, in said Division of said District this 21st day of December, in the year of our Lord, Nineteen Hundred and Forty-five.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.
By John J. Jarvis,
Deputy Clerk.

Filed Dec. 21, 1945. E. E. Koch, Clerk.

[fol. 97] Motion of the United States of America to Consolidate Appeals for Printing the Record, Filing Briefs, Hearing and Decision.

In the United States Circuit Court of Appeals for the Eighth Circuit.

Nos. 13223, 13,226, 13227, and 13228.

United States Of America, Appellant,

vs.

Q. W. S. S. Realty And Investment Company, A Corporation, Et Al., Appellees.

United States of America, Appellant,

vs.

Edgar S. Albrecht, et al., Appellees.

United States of America, Appellant.

vs.

Edward J. Linnenbringer, et al., Appellees.

United States of America, Appellant,

vs.

Dennis B. Pitman, et al., Appellees.

[fol. 98] The United States of America, appellant, moves that the appeals taken by the United States from the judgments entered in the above-entitled causes be consolidated for the purpose of printing the record, filing briefs, hearing and decision and that the United States be permitted to file a single consolidated brief as appellant from the judgments in the several causes.

This motion is made for the following reasons:

The above causes arise out of proceedings to condemn certain lands in St. Charles County, Missouri, for the Weldon Spring Ordnance plant. The question present in each case concerns the allowance in a condemnation judgment of interest on the difference between the sum deposited with a Declaration of Taking and the price agreed to be paid by the United States in a contract to purchase the land condemned from the date of the filing of the Declaration of Taking to the date of the deposit of such difference in court. The same question thus being presented in all

of the cases, it is desirable that the United States deal with it in a single brief and that the cases be argued and considered together to avoid repetition.

Respectfully submitted,

J. EDWARD WILLIAMS,
Acting Head, Lands Division.

HARRY C. BLANTON,
United States Attorney,
St. Louis, Missouri.

Agreed to:
Samuel M. Watson,
Attorney for Defendant,
4254 Olive St.,
St. Louis, Mo.

George Eigel,
Atty. for Albert W.
Albrecht & Virginia Albrecht.

R. C. Coburn,
Atty. for Edgar S. Albrecht and
Geraldine Albrecht.

Wm. Wayne, Jr.,
Wm. R. Gilbert,
208 North Broadway, St. Louis 1, Mo.
Attorneys for Edward J. Linnenbringer.

[fol. 99] Wm. H. Allen,
Attorney for Landowners in No. 997.

(Endorsed): Nos. 13,223, 13,226, 13,227 and 13,228. Motion Appellant that causes be consolidated for purpose of printing record, filing briefs, etc., and Consents by Appellees. Filed in U. S. Circuit Court of Appeals on December 26, 1945.

[fol. 289] And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant in Cause No. 13,223.)

United States Circuit Court of Appeals

Eighth Circuit

United States of America, Appellant,
No. 13,223. vs.
Edgar S. Albrecht, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

J. EDW. WILLIAMS,
Washington, D. C.

HARRY C. BLANTON,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 14, 1945.

(Appearance of Mr. Richmond C. Coburn as Counsel for Appellees Edgar S. Albrecht and Geraldine Albrecht in Cause No. 13,223.)

The Clerk will enter my appearance as Counsel for the Appellees Edgar S. Albrecht and Geraldine Albrecht.

IGOE, CARROLL, KEEFE
AND COBURN

and

RICHMOND C. COBURN
1530 Boatmen's Bank Bldg.
St. Louis 2, Mo.

[fol. 290] (Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 15, 1945.

(Appearance of Mr. George Eigel as Counsel for Appellees Albert W. Albrecht, Jr., and Virginia Albrecht in Cause No. 13,223.)

The Clerk will enter my appearance as Counsel for the Appellees Albert W. Albrecht, Jr., and Virginia Albrecht.

GEORGE EIGEL.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 19, 1945.

(Appearance of Counsel for Appellant in Cause No. 13,226.)

United States Circuit Court of Appeals

Eighth Circuit

United States of America, Appellant,
No. 13,226. vs.
Q. W. S. S. Realty and Investment Company.

The Clerk will enter my appearance as Counsel for the Appellant.

J. EDWARD WILLIAMS
Dept. of Justice
HARRY C. BLANTON
RUSSELL VANDIVORT

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 26, 1945.

[fol. 291] (Appearance of Counsel for Appellee in Cause No. 13,226.)

The Clerk will enter my appearance as Counsel for the Appellee.

SAMUEL M. WATSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 15, 1946.

(Appearance of Counsel for Appellant in Cause No. 13,227.)

United States Circuit Court of Appeals

Eighth Circuit

United States of America, Appellant,
No. 13,227. vs.
Edward J. Linnenbringer and Emma Linnenbringer, wife of Edward J. Linnenbringer.

The Clerk will enter my appearance as Counsel for the Appellant.

J. EDWARD WILLIAMS
Dept. of Justice
HARRY C. BLANTON
RUSSELL VANDIVORT

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 26, 1945.

[fol. 292] (Appearance of Counsel for Appellee Edw. J. Linnenbringer in Cause No. 13,227.)

The Clerk will enter my appearance as Counsel for the Appellee Edw. J. Linnenbringer.

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(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 15, 1946.

(Appearance of Counsel for Appellant in Cause No. 13,228.)

United States Circuit Court of Appeals

Eighth Circuit

United States of America, Appellant,
No. 13,228. vs.
Dennis B. Pitman and May Dell Pitman, wife of Dennis B. Pitman.

The Clerk will enter my appearance as Counsel for the Appellant.

J. EDWARD WILLIAMS
HARRY C. BLANTON
RUSSELL VANDIVORT

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 26, 1945.

[fol. 293] (Appearance of Counsel for Appellees in Cause No. 13,228.)

The Clerk will enter my appearance as Counsel for the Appellees.

WM. H. ALLEN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 24, 1945.

(Order of Submission in Causes Nos. 13,223, 13,226, 13,227 and 13,228.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1946.

Friday, March 8, 1946.

United States of America, Appellant,
No. 13,223. vs.
Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht.

Appeal from the District Court of the United States for the Eastern District of Missouri.

United States of America, Appellant,
No. 13,226. vs.
Q. W. S. S. Realty and Investment Company.

Appeal from the District Court of the United States for the Eastern District of Missouri.

United States of America, Appellant,
No. 13,227. vs.
Edward J. Linnenbringer and Emma Linnenbringer, wife of Edward J. Linnenbringer.

Appeal from the District Court of the United States for the Eastern District of Missouri.

and

[fol. 294] United States of America, Appellant,
No. 13,228. vs.
Dennis B. Pitman and May Dell Pitman, wife of Dennis B. Pitman.

Appeal from the District Court of the United States for the Eastern District of Missouri.

These causes, Nos. 13,223, 13,226, 13,227 and 13,228, having been called for hearing in their regular order are argued together, and argument was commenced by Mr. Harry C. Blanton, United States Attorney, for the United States of America, continued by Mr. Samuel M. Watson, for appellee in No. 13,226, Q. W. S. S. Realty and Investment Company, and by Mr. William H. Allen for the appellees in No. 13,228, Dennis B. Pitman, et al., and concluded by Mr. Harry C. Blanton, United States Attorney, for the United States of America, counsel for the appellees in No. 13,223, Edgar S. Albrecht, et al., and for the appellees in No. 13,227, Edward J. Linnenbringer, et al., not appearing to present oral arguments. These causes are thereupon taken by the Court as submitted on the transcripts of the records from said District Court and the briefs of counsel filed herein.

[fol. 295] Opinion in Causes Nos. 13,223, 13,226, 13,227 and 13,228.)

United States Circuit Court of Appeals

Eighth Circuit.

No. 13,223.

United States of America, Appellant, vs. Edgar S. Albrecht, et al., Appellees.	Appeal from the District Court of the United States for the Eastern District of Missouri.

No. 13,226.

United States of America, Appellant, vs. Q. W. S. S. Realty and Investment Company, a Corporation, Appellee.	Appeal from the District Court of the United States for the Eastern District of Missouri.

No. 13,227.

United States of America, Appellant, vs. Edward J. Linnenbringer, et al., Appellees.	Appeal from the District Court of the United States for the Eastern District of Missouri.

No. 13,228.

United States of America, Appellant, vs. Dennis B. Pitman, et al., Appellees. } Appeal from the District Court of the United States for the Eastern District of Missouri.

[April 9, 1946.]

Mr. Harry C. Blanton, United States Attorney (Mr. J. Edward Williams, Acting Head, Lands Division; Mr. S. Russell Vandivort, Assistant United States Attorney; and Mr. Roger P. Marquis and Miss Wilma C. Martin, Attorneys, Department of Justice, were with him on the brief), for Appellant.

Mr. George Eigel and Messrs. Igoe, Carroll, Keefe & Coburn submitted brief for Edgar S. Albrecht, et al.

Mr. Samuel M. Watson for appellee, Q. W. S. S. Realty & Investment Company.

Messrs. William Waye, Jr., Roscoe Anderson and William R. Gilbert submitted brief for Edward J. Linnenbringer, et al.

Mr. William H. Allen for appellees, Dennis B. Pitman, et al.

Before SANBORN, THOMAS, and RIDDICK, Circuit Judges.

RIDDICK, Circuit Judge, delivered the opinion of the Court.

These cases are companion cases to No. 13,174, Oliver, et al. v. United States, decided this day. They present,

on facts identical so far as material, the question decided in the Oliver case. In these cases, however, the judgment of the District Court was in favor of the appellee landowners. Since the decision here is ruled by the Oliver case, the judgment in each of the cases is reversed, and each case is remanded to the District Court with directions to enter judgment in favor of the appellees for the consideration stipulated in the contract between appellees and the United States without interest.

[fol. 298] (Opinion in Cause No. 13,174.)

United States Circuit Court of Appeals

Eighth Circuit.

No. 13,174.

Lola Castlio Oliver and A. Ray Oliver, her Husband, and Mrs. B. I. Castlio, (also known as B. Irene Castlio),
Appellants,
vs.
United States of America,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

[April 9, 1946.]

Mr. Richmond C. Coburn (Messrs. Igoe, Carroll, Keefe & Coburn and Mr. Robert V. Niedner were with him on the brief) for Appellants.

Mr. Harry C. Blanton, United States Attorney (Mr. J. Edward Williams, Acting Head, Lands Division; Mr.

M. Walker Cooper, Special Assistant to the United States Attorney; Mr. S. Russell Vandivort, Assistant United States Attorney; and Mr. Roger P. Marquis and Miss Wilma C. Martin, Attorneys, Department of Justice, were with him on the brief), for Appellee.

Before SANBORN, THOMAS, and RIDDICK, Circuit Judges.

RIDDICK, Circuit Judge, delivered the opinion of the Court.

This is one of the numerous controversies growing out of the acquisition by the United States of a large tract of land near Weldon Springs in St. Charles County, Missouri, to be used as a location for a Government ordnance plant. The efforts of the War Department to purchase the land in the area selected for the ordnance plant, its acceptance of approximately 270 contracts from owners to convey their tracts to the United States for stipulated sums, and its unsuccessful attempt to repudiate all of the contracts of purchase which had not been fully executed on the conclusion that the contracts violated the statutory prohibition of a cost-plus-a-percentage-of-cost system of contracting in section 1 of the National Defense Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A., Appendix, § 1171, are detailed in the opinion of the District Court for the Eastern District of Missouri in *United States* v. *Certain Land Situate in St. Charles County, Missouri*, 46 F.Supp. 921; and in the opinions of this court in *United States* v. *Muschany*, 139 F.2d 661, and of the Supreme Court in *Muschany* v. *United States*, 324 U.S. 49.

This case involves one of the purchase contracts. Since the decision of the Supreme Court in *Muschany* v. *United States, supra*, the validity of contract is established. The sole question on this appeal is whether the owners of the land are entitled to recover interest in addition to the

price stipulated in the purchase contract in a proceeding instituted by the United States, following its attempted repudiation of the contract, to acquire the land by condemnation. The contract was executed by the appellant landowners on the 24th day of December, 1940, and accepted on behalf of the United States by the authorized agent of the War Department on the following 28th day of December. The contract is entitled "Option to Purchase Land." It recites that for the consideration of $1.00 paid by the United States the owners agree to sell and convey to the United States for a consideration of $70,000 the land, together with the right of immediate occupancy and use of the land for any purpose whatsoever from and after acceptance by the United States of the purchase contract until such land is conveyed to the United States by the owners and title approved by the Attorney General of the United States and the agreed purchase price paid by the United States to the owners. The landowners agree to furnish the Government a good and merchantable title to the land, free of all liens and encumbrances, and further that the Government may acquire the land by condemnation in the event the title offered by the landowners is not approved by the Attorney General. The paragraph with reference to condemnation is as follows:

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

After taking possession under the contract and following the conclusion that the purchase contract was void,

the United States on June 6, 1941, instituted proceedings for condemnation of the land. On that date the United States filed its declaration of taking and deposited in the registry of the court $21,500 as estimated just compensation. On the same day an order was entered vesting title in the United States. The landowners filed an answer, setting up the purchase contract, insisting upon its validity, and requesting the court to fix the award for the land at the sum stipulated in the contract with interest at six per cent per annum from the date of the acceptance of the contract by the Government. Perhaps because the parties were awaiting final decision in the Muschany case as to the validity of the purchase contract there brought in question, which was identical with the contract involved in the present case so far as material to the question here, nothing more was done until after the decision of the Supreme Court in that case came down on February 5, 1945. On April 6, 1945, the United States filed a motion in the condemnation proceedings, reciting that the validity of the purchase contract had been sustained by the Supreme Court in the Muschany case, and asking an order of the District Court directing the United States to pay into the registry of the court the difference between the sum of $21,500 theretofore deposited as estimated compensation and the price stipulated in the purchase contract and for judgment in condemnation in accordance with the contract. To this motion the landowners filed a response, consenting to judgment in condemnation in favor of the United States for the price stipulated in the purchase contract, plus interest thereon from the date of acceptance of the contract by the Government until the deposit of the estimated compensation made with the declaration of taking in the condemnation proceedings on June 6, 1941, and with interest at six per cent thereafter on the difference ($48,500) between the amount deposited with the declaration of taking and

the price stipulated in the purchase contract. On May 14, 1945, the trial court entered a judgment sustaining the motion of the United States and denying interest. The landowners appeal.

The right of an owner to just compensation for his land taken by the United States is guaranteed by the Constitution. Just compensation is the fair value of the land paid contemporaneously with its taking. Where the taking precedes the payment of fair value, the owner is deprived of the use of the land or of the use of its equivalent in money for the time between the taking and payment. In such cases, in order that the owner shall not suffer loss and shall receive the just compensation guaranteed him by the Constitution, he is entitled to interest upon the fair value of the land from the date of the taking until payment. *United States* v. *Rogers*, 255 U.S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 305-306. This constitutional right of the owner whose property is taken is recognized in the Act under which the condemnation in this case proceeded. The statutory provision is that just compensation "shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court." 40 U.S.C.A., § 258a.

Contracts between the Government and a landowner made in contemplation of acquisition of land by condemnation, fixing the value of the land for that purpose, are valid. *Danforth* v. *United States*, 308 U.S. 271, 282; *Bank of Edenton* v. *United States*, 4 Cir., 152 F.2d 251, 254. Plainly, where after such a contract the United States acquires possession of the land in the contemplated condem-

nation proceedings and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of taking until payment in order that the constitutional requirement of just compensation may be satisfied. Conversely, where the payment of the agreed value and the taking in the condemnation proceedings are contemporaneous, interest is not allowable. Nothing more is held in the Danforth case. It must also be true that where, as in the present case, the agency of the Government acquiring the land for the United States is authorized to acquire it by purchase, contracts made by it on behalf of the United States with the landowners may validly fix the net amount to be received by the landowner from the United States for the taking of the land either by purchase or by condemnation. In such a contract the parties may bind themselves to a consideration which may be either greater or less than just compensation in the constitutional sense. That this was the effect of the contract in question here we have no doubt. By it, the United States acquired the possession and the use of the land until title vested in it by the payment of the stipulated purchase price. See *Muschany* v. *United States, supra,* p. 62.

In the present case the United States having repudiated its purchase contract, the landowners could have accepted this repudiation and in the condemnation proceedings recovered, as a part of just compensation, interest at the statutory rate upon the amount awarded them in excess of the amount paid into the registry of the court at the time of the declaration of taking. They were, however, within their rights in insisting upon the validity of the purchase contract and upon its controlling effect upon the question of the compensation to be received by them, as they did throughout these proceedings. Having taken this position, their right to recover interest upon the sum stipulated in the purchase contract depends upon the in-

terpretation of that contract which, of course, must be considered in its entirety. The landowners are not entitled to insist upon provisions of the contract favorable to them while rejecting others which are unfavorable.

There is no provision in the contract for the payment of interest on the stipulated consideration, nor does the contract fix a time within which payment is required. Delay in the payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied. The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States. The purchase price stipulated in the contract may be fairly regarded, at the very least, as the agreed equivalent of just compensation for the taking of the land by condemnation or by purchase. By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract. They may not complain that the resulting award to them was, in the words of the contract on which they rely, "in accordance with all the terms and provisions of this option."

The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, can not justify the award of interest not required by the contract. In the absence of a statute or an express contract providing for it, interest can not be added to an obligation of the United States. *United*

States v. *North Carolina*, 136 U.S. 211; *United States* v. *Rogers, supra*, p. 169; *Seaboard Air Line Ry. Co.* v. *United States, supra*, p. 304. The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation. "* * * interest does not run upon claims against the Government even though there has been a default in the payment of the principal." *Smyth* v. *United States*, 302 U.S. 329, 353.

We have not overlooked the decision in *United States* v. *Baugh*, 5 Cir., 149 F.2d 190. We think that case may be distinguished from this on the ground that the contract there involved was interpreted by the court as fixing only the fair value of the land for the purpose of a condemnation then proceeding. If, however, this distinction is not warranted, we are unable to follow the decision in the Baugh case.

The judgment of the District Court is affirmed.

[fol. 306] (Judgment in Cause No. 13,223.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1946.

Tuesday, April 9, 1946.

United States of America, Appellant,
No. 13,223. vs.
Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter judgment in favor of the appellees, Edgar S. Albrecht, Geraldine Albrecht, Albert W. Albrecht, Jr., and Virginia Albrecht, for the consideration stipulated in the contract between appellees and the United States without interest.

April 9, 1946.

[fol. 307] (Judgment in Cause No. 13,226.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1946.

Tuesday, April 9, 1946.

United States of America, Appellant,
No. 13,226. vs.
Q. W. S. S. Realty and Investment Company,
a corporation.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter judgment in favor of the appellee, Q. W. S. S. Realty and Investment Company, a

corporation, for the consideration stipulated in the contract between appellees and the United States without interest.

April 9, 1946.

[fol. 308] (Judgment in Cause No. 13,227.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1946.

Tuesday, April 9, 1946.

United States of America, Appellant,
No. 13,227. vs.
Edward J. Linnenbringer and Emma Linnenbringer, wife of Edward J. Linnenbringer.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter judgment in favor of the appellees, Edward J. Linnenbringer and Emma Linnenbringer, wife of Edward J. Linnenbringer, for the consideration stipulated in the contract between appellees and the United States without interest.

April 9, 1946.

[fol. 309] (Judgment in Cause No. 13,228.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1946.

Tuesday, April 9, 1946.

United States of America, Appellant,
No. 13,228. vs.
Dennis B. Pitman and May Dell Pitman,
wife of Dennis B. Pitman.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, reversed without costs.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter judgment in favor of the appellees, Dennis B. Pitman and May Dell Pitman, wife of Dennis B. Pitman, for the consideration stipulated in the contract between appellees and the United States without interest.

April 9, 1946.

IN THE

United States Circuit Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 13,223.

UNITED STATES OF AMERICA, Appellant,

vs.

EDGAR S. ALBRECHT et al., Appellees.

No. 13,226.

UNITED STATES OF AMERICA, Appellant,

vs.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, Appellee.

No. 13,227.

UNITED STATES OF AMERICA, Appellant,

vs.

EDWARD J. LINNENBRINGER et al., Appellees.

No. 13,228.

UNITED STATES OF AMERICA, Appellant,

vs.

DENNIS B. PITMAN et al., Appellees.

Appeals from the District Courts of the United States for the Eastern District of Missouri, Eastern Division, Judges George H. Moore and R. M. Duncan, Presiding.

MOTION FOR REHEARING

Of Appellees Edgar S. Albrecht and Geraldine Albrecht, His Wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, His Wife.

Now come the appellees Edgar S. Albrecht and Geraldine Albrecht, his wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, within fifteen days after the date of the judgment entered by this Court on the 9th day of April, 1946, and move the Court to set aside its opinion, decision and judgment and to order a rehearing of the issues involved in this appeal, for the reason that the said

opinion of the Court inadvertently overlooked certain material matters of law and fact involved in this cause, in the following particulars, to wit:

I.

The Court, in its opinion, treats the case as if it were one for the specific performance of a contract and inadvertently overlooks the fact that this is a condemnation suit in which the Government obtained the title to the land in question under the provisions of 40 U. S. C. A., Section 258a, under the express terms of which it is bound to pay interest.

The unexpressed premise of the Court's opinion seems to be that this is a suit on a contract for specific performance, and since the Government cannot be held to pay interest in a suit on a contract unless the contract specifically calls for the payment of interest, therefore no interest is allowable. In so doing, the Court overlooks the fact that this is not a suit against the Government for the specific performance of any contract. The District Court would have no jurisdiction of such a suit under 28 U. S. C. A., Section 41 (20), where the Tucker Act limits the jurisdiction of the Federal District Courts in suits on contracts against the Government to controversies involving not more than $10,000. To repeat, this is not a suit for specific performance of a contract. If this Court believes it is, then it is forced to the conclusion that neither the District Court nor this Court has any jurisdiction of the cause.

This Court mentions the existence of 40 U. S. C. A., Section 258a, only once in its opinion, on page 4, where it comments that the statute recognizes the constitutional rights of the landowner. The truth of the matter is that the Government in this cause obtained all of its rights to the land in question solely under the provisions of this statute. The option contract did not purport to pass title.

The Government repudiated the option contract and did not receive title under any deed. It obtained title by its Declaration of Taking and the order and judgment on the Declaration of Taking, which stated "that the title to said land in fee simple absolute, vested in the United States of America upon the filing of said Declaration of Taking."

Since the Government did not obtain title under the option contract, and did obtain title only by virtue of the Declaration of Taking filed under 40 U. S. C. A., Section 258a, the Government's rights and duties in obtaining title are measured by that statute with one exception: The Supreme Court of the United States, in **Muschany v. United States**, 324 U. S. 49, 65 S. Ct. 442, held that in the condemnation suit the Government is bound by the contract insofar as the contract price establishes the fair value of the land. The Supreme Court did not hold that the relationship between the Government and the landowners rested solely on contract because, if so, the Government would not now have title to the land. That title it obtained only by virtue of the statute.

Having obtained the benefit of the statute, the Government is bound by the terms of the statute to the payment of interest. Phrased differently, the effect of **Muschany v. United States**, supra, is to ingraft upon the rights and duties of the parties under the statute the provisions of the contract so far as it sets the fair value of the land.

Considerable space in the opinion is taken up with an interpretation and construction of the contract, but in so doing no mention is made of the effect of the provisions of the statute which provide for interest. Really, the only room for interpretation of the contract is to start with the premise that since the Government obtained its rights under the statute which provides for interest, the contract must be examined solely with a view to determine whether or not the landowners expressly waived their rights to

interest under the statute. That approach to the interpretation of the contract is overlooked by the Court.

If the Court starts with the central fact in this suit that the rights of the Government in this condemnation suit spring solely from he statute, it cannot treat the matter as if it were specifically enforcing the contract against the Government and as if 40 U. S. C. A., Section 258a, were not pertinent. This is either a suit in condemnation in which the Government is bound by the statute under which it acted, unless the parties have expressly waived the provisions of the statute by contract, or it is an action for specific performance of a contract, in which case the United States District Court had no jurisdiction of the case at all.

II.

As we understand the opinion of the Court, its holding is fairly summarized as follows: The landowner is constitutionally guaranteed just compensation for his land, which is the fair value of the land when payment is contemporaneous with taking, but where payment is subsequent to taking, includes interest from the date of taking until payment. When the Government and the landowner enter into a contract in contemplation of condemnation, the contract must fall into one of two classes: (a) contracts between the Government and a landowner, made in contemplation of acquisition of land by condemnation "fixing the value of the land for that purpose", fall within the constitutional requirement for the payment of interest; or (b) contracts which "fix the net amount to be received by the landowner from the United States for the taking of the land either by purchase or by condemnation", as to which no interest need be paid. To determine whether interest is payable, the contract in question must be interpreted "in its entirety" and placed in

either category (a) or category (b). The determining factors in classifying a contract are said to be:

(1) If there is no provision for interest, the contract falls under classification (b);

(2) If the contract does not fix a definite time within which payment is required or contemplates delay in payment, the contract falls in category (b).

So far as this Court holds that a contract which covers only the fair value of the land is subject to the constitutional and statutory requirements for the payment of interest, but a contract in which the purchase price by agreement covers both the fair value of the land and the use of the land by the Government until payment therefor is not subject to the payment of interest by the Government because, by construction, the equivalent of that interest was originally included by the parties in the purchase price, we are in accord. We believe, however, that the tests applied by this Court in attempting to draw a line between the two classes of contracts mentioned are faulty and will not stand analysis.

The nature of the contract cannot be determined by the absence of a provision specifically calling for the payment of interest. Interest is guaranteed both under the Constitution and by statute. Thus, if a landowner should follow this Court's opinion, pages 4 and 5, and draw up a contract in contemplation of acquisition of land by condemnation "fixing the value of the land for that purpose", this Court says that as to such a contract "interest must be allowed the owner". Thus such a contract which did not in any way, shape or form mention interest would, however, be subject to the constitutional and statutory requirement that interest be paid. Yet, on page 6 of this Court's opinion, in interpreting the contract in this case, it relies upon the fact that "there is

no provision in the contract for the payment of interest on the stipulated consideration" in reaching the conclusion that this contract did not merely establish the fair value of the land. It is evident from the opinion, on pages 4 and 5, that a specific provision for interest is not necessary for a class (a) contract because interest follows by virtue of constitutional and statutory requirements. Yet on page 6 of the opinion the fact that there is no provision for interest seems to be determinative to the Court that the contract is a class (b) contract. (Evidently this confusion springs from the Court's unexpressed premise that it is dealing with a suit for the specific performance of a contract and that in such a suit interest cannot be allowed against the Government unless the contract specifically calls for it.)

The second test used by the Court in its opinion to determine the nature of the contract (Opinion, page 6) is whether or not the contract fixes a definite time within which payment is required or contemplates delay in payment. Again the Court has inadvertently used a faulty test.

Suppose that in accordance with the opinion of this Court, on pages 4 and 5, a contract should be drawn up between the Government and a landowner which did not provide for the giving of a deed but provided solely for the acquisition by the Government of the land by condemnation and provided that in such contemplated condemnation suit the parties, by agreement, fixed "the value of the land for that purpose" and that the agreed value of the land should be deposited by the Government with its petition in condemnation. Presume the circumstances at the time to be as they were in 1940, that the Government desired immediate possession by virtue of an emergency but did not have manpower or program sufficient to allow an immediate filing of the condemnation

suit, so it provided for immediate possession in the contract. Sometime later the Government files the condemnation suit under 40 U. S. C. A., Section 258a, but instead of depositing the agreed amount, deposits only a small fraction thereof, and after a lapse of some four years, the Government is forced by decision of the Supreme Court to pay the agreed amount. Would the Government then have to pay interest? This Court, in its opinion (p. 5), says:

> "Plainly, where after such a contract the United States acquires possession of the land in contemplated condemnation proceedings and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of taking until payment in order that the constitutional requirement of just compensation may be satisfied."

Yet, in such a case where the contract between the parties followed the exact wording of this Court's opinion, the agreemen would have failed to fix an exact date on which payment was to be made and delay in the payment would be clearly implied from the contract, so that despite the test of failure to fix an exact date and contemplated delay, this Court would, under its opinion on pages 4 and 5, be forced to allow interest. It would appear from the opinion itself that the lack of definite date and delay are not accurate tests.

Another illustration may exhibit the fallacy of this test. Suppose a contract to purchase land was entered into by the Government with the landowner. No mention is made at all of possible condemnation, but the contract merely sets out the purchase price and provides that upon the furnishing of a deed and certificate of title by the seller, the Government shall pay the agreed purchase price. It is hornbook law that the contract would not be found invalid, though no date for performance was specifically stated,

since any court would find that the contract was to be performed in a reasonable time. Suppose that after the contract was entered into, but before the termination of a reasonable time, the Government repudiated the contract and condemned the land under 40 U. S. C. A., Section 258a, and the Government deposited only a small fraction of the agreed purchase price. Under **Muschany v. United States**, supra, and **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231, the contract would be binding in condemnation as to the fair value of the land. What about interest? The Government did not take title by the contract and no deed was given. The parties did not have interest in mind at all in the contract. Obviously the contract was intended to cover the fair value of the land. The tests used by this Court, on page 6 of its opinion, would indicate that no interest would be paid; but under the holding in this opinion, on pages 4 and 5, interest would have to be allowed. Why? The parties only agreed on one thing, namely, the fair value of the land. The right to interest would follow not from the contract but from the Constitution and condemnation statute. Yet no mention would have been made of interest and there would have been no specific date for payment and delay would have been contemplated. It is submitted that the tests used by this Court, on page 6 of its opinion, are wholly erroneous and contradictory to this Court's opinion on pages 4 and 5. (Again, the reason for the contradiction in the opinion evidently springs from this Court's failure to recognize the fact that the rights of the Government as to this land originated solely in condemnation by virtue of the statute. The right to interest did not originate in contract and the rules as to allowing interest in suits on a contract against the Government are not applicable. Where the Government obtains its rights by condemnation, it must pay interest unless the contract waives the right of the landowner to interest.)

But if it is necessary that the option contract in this case

fix a date by which payment should be made, the contract does fix such a date. The contract provided that upon furnishing a final certificate of title, the Government should pay the purchase price (Record, p. 37). Under elementary law the landowner would have only a reasonable time to furnish such a certificate of title. The contract also provides that if the title should not be approved by the Attorney General, the Government should file a condemnation suit and "upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court." Thus, the contract itself furnishes the date of payment with reasonable certainty in the absence of condemnation and specifically furnishes the date for payment in the event of condemnation, namely, the date that the Government filed its condemnation petition.

What other tests can be applied to this contract to determine whether it falls into class (a) or class (b)? Perhaps the wording of the contract so far as it relates to the consideration is as good a test as any to determine the intent of the parties as to whether they were dealing with an amount which represented the "value of the land" or the value of the land plus the use of the land by the Government until payment. The option contract refers to the consideration on six occasions in the following terms:

(1) "To sell and convey to the Government for the consideration of * * *"

(2) "Gross sales price."

(3) "The agreed purchase price."

(4) "The agreed purchase price."

(5) "Under a consent verdict fixing the award at the agreed valuation."

(6) "Said agreed purchase price."

It may be admitted that the phrase "agreed purchase price" is not completely determinative. It is obvious from the record, however, that that phrase was used in connec-

tion with the idea that the landowner was presently agreeing to sell his land for the consideration named, with the whole deal to be consummated in the near future in a reasonable time. Certainly the phrase cannot be twisted to mean that the parties contemplated that the Government would delay payment for a period of 4½ years and that the purchase price was intended to cover both the fair value of the land and the use of the land during that period. The truth of the matter is that when those phrases were used, the only thing the parties contemplated was an immediate sale and immediate payment of the purchase price, and that what they had in mind was the value of the land at that time, not just compensation in the sense of fair value of the land plus the use of it for 4½ years.

At the one point in the option contract where condemnation is contemplated, the contract provided that the Government could acquire the land by condemnation proceedings "under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will, upon filing its petition in said proceedings, deposit said agreed purchase price with the clerk of said court." Here the term "consent verdict" is used, the term "award" is used, and the term "agreed valuation" is used. All of these terms are synonymous only with the idea that the consideration there referred to represented the fair value of the land plus, at most, the use by the Government of the land, until it filed its petition in condemnation. The use of these terms must be construed in the light of the condemnation procedure where the verdict of the jury, after an appeal from commissioners, fixes the fair value of the land on the date of taking, and the Court, under the provisions of the statute, adds to the fair value of the land six per cent interest from the date of taking, the total sum being just compensation. This Court has inadvertently overlooked this provision of the contract in determining whether or not the parties in-

tended to contract only for the fair value of the land or for full and just compensation including fair value and the use of the land for 4½ years while the Government failed to pay.

For this Court to say, in its opinion, that by this contract the landowners intended to hand over the land to the Government and receive the purchase price from the Government at some indefinite time in the future, in this case almost 4½ years from the time the Government took possession, and that the parties intended by their contract that the purchase price covered the use by the Government of the land during all of that period and the retention by the Government of the money during that period where the contract specifically provided that payment should be made the moment the Government filed its petition in condemnation constitutes an inadvertent overlooking by the Court of the express terms of this contract. If the intent of the contracting parties is the true test rather than the ones mentioned by this Court (and having in mind that the landowner in no wise prepared this contract, and that a contract must be interpreted against the party drawing it), then it follows that the conclusion that it was the intent of the landowners in these cases to forego interest by this contract must be arrived at by some highly artificial tests having no relation to the actual state of mind of the parties as expressed in the contract.

III.

The Court has inadvertently overlooked the grounds for the decision in **United States v. Baugh**, 149 Fed. (2d) 190 (C. C. A. 5), in distinguishing that case.

In **United States v. Baugh**, supra, the Government and the landowners entered into a contract whereby the Court, in condemnation, was authorized to adjudge "just compensation for the lands taken, to be in the sum of * * *." The contract in no wise mentioned interest and did not set

any specific date for payment. The Court held (1) that under the Constitution a landowner is entitled to interest on the fair value of its property, and that a stipulation in regard to compensation which does not cover interest in no wise disturbs the constitutional right of the landowner to interest; (2) that the constitutional right to interest will not be presumed to have been waived merely by the failure to specifically provide for it in writing. It is interesting to note that the amount which the Government agreed to pay for the land was referred to as "just compensation for the lands taken," but nevertheless the Court held that the landowner was also entitled to interest on the amount fixed by the contract in order to satisfy the constitutional guaranty of just compensation.

For purposes of possible review of this Court's opinion, it is felt that it would be fair if this Court flatly stated that it refused to follow the ruling in the **Baugh** case, as it obviously does. The distinguishing of the **Baugh** case in this opinion, in view of the wording of the contract in that case, as compared with the wording of the contract in the present case, is really only a refusal to follow that decision, and such holding should be made explicit.

Respectfully submitted,

GEORGE EIGEL,
Attorney for Appellees Albert W. Albrecht, Jr., and Virginia Albrecht, His Wife.

HOE, CARROLL, KEEFE & COBURN,
RICHMOND C. COBURN and
THOMAS L. CROFT,
Attorneys for Appellees Edgar S. Albrecht and Geraldine Albrecht, His Wife.

Richmond C. Coburn, one of the attorneys for appellees Edgar S. Albrecht and Geraldine Albrecht, his wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, hereby certifies that the foregoing Motion for Rehearing is filed for the sole purpose of calling the Court's attention to material matters of law or fact inadvertently overlooked by the Court in its opinion, as is shown by its opinion and the foregoing Motion for Rehearing, and that said Motion is not made for the purpose of delay, but is filed in good faith and is believed to be meritorious.

Richmond C. Coburn,
Attorney for Appellees.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 23, 1946.

[fol. 323] (Order denying Motion of Appellees for Rehearing in Cause No. 13,223.)

March Term, 1946.

Tuesday, April 30, 1946.

Motion for rehearing filed by appellees in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

April 30, 1946.

IN THE

United States Circuit Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 13,226.
Civil.

UNITED STATES OF AMERICA,
Appellant,

vs.

Q. W. S. S. REALTY AND INVESTMENT COMPANY,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

PETITION OF Q. W. S. S. REALTY AND INVESTMENT COMPANY FOR A REHEARING.

Comes now Q. W. S. S. Realty and Investment Company, a corporation, within fifteen days after the filing of the opinion and decision of the Court in this cause, which opinion and decision recites that it is in accordance with the opinion and decision in the Oliver Case, being No. 13,174, and respectfully moves and petitions the Court to grant it a rehearing of said cause for the following reasons, to-wit:

I.

The Court, after commenting that contracts between the Government and a landowner made in contemplation

of acquisition of land by condemnation and fixing the value of the land for that purpose are valid, comments further that: "Plainly, where after such a contract the United States acquired possession of the land in the contemplated condemnation proceeding and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of the taking until the payment in order that the constitutional requirement of just compensation may be satisfied." The Court then comments that where the Government acquiring agency is authorized to acquire land by purchase, contracts made with landowners may validly fix the net amount to be received for the taking of the land either by purchase or by condemnation and that the parties in such a contract may bind themselves to a consideration either more or less than just compensation in the constitutional sense. The Court then holds in substance that, the United States having by the terms of the contract acquired possession and use of the land until title should vest by reason of payment therefor, the effect of the contract was to bind the landowner to the consideration named and no more as compensation for delayed payment. In support of this holding the Court at a later point in the opinion states that: "Delay in the payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied." We submit that in reaching the conclusion that under the facts of this condemnation case the landowner is bound to accept and is entitled to compensation in the amount of the consideration named in the contract and nothing additional as compensation for delayed payment, the Court overlooked the fact that condemnation was contemplated by the contract in the case at bar if the Government should choose to use that process, and the further fact that even though the Government obtained possession under the contract and retained possession thereafter un-

til it acquired title by the Declaration of Taking, it nevertheless, while retaining said possession, lost the right to possession and became an unlawful holder thereof immediately upon its repudiation of the contract and again acquired the **right of possession only by virtue of a condemnation proceeding.** We submit that these facts so overlooked by the Court bring this case within the state of facts stated by the Court to be a state of facts which makes the payment of interest necessary in order to accomplish just compensation as contemplated by the fifth amendment, the Court having said as above quoted in substance that where after entrance by the Government into a contract made in contemplation of the acquisition of land by condemnation the United States acquires possession in the condemnation proceeding and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of the taking until payment.

II.

The Court in reaching the conclusion described in our paragraph I completely overlooked the fact that while: "Delay in the payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied" from the contract, nevertheless, such inference or implication from the contract is limited to such delay only as is occasioned by the good faith performance of those things provided for by the contract and cannot possibly be extended to cover such delay as is occasioned by a repudiation of the contract itself and by a condemnation suit brought for the purpose of acquiring the land by a process and for a consideration in entire contravention of the contract. That the parties to the contract sought to avoid delay in payment pending the clearing of title by condemnation is clearly demonstrated by the fact that the contract itself provides for

the payment of the agreed valuation into Court at the time of the filing of such a condemnation suit. This contract does not provide for protracted delay for the purpose of accomplishing its own nullification.

III.

The Court says in its opinion: "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States." We submit that the Court in reaching this conclusion overlooked the fact the contract describes the consideration named therein as the agreed **valuation** (R. 93) and that the contracting parties provided against delay by providing that the agreed valuation should be paid into Court at the beginning of the condemnation proceeding and naturally did not contemplate that there would be substantial delay unless condemnation to perfect title became necessary and that in view of these assurances against delay the landowner was willing to grant possession without any promise of additional consideration over and above the value of the land, but that when delay occasioned by refusal on the Government's part to adhere to the contract provisions against delay occurred the landowner under the just compensation provision of the fifth amendment became entitled to compensation for such delay in addition to the agreed valuation.

IV.

The Court says in its opinion that by reason of the Government's repudiation of the contract the landowner was at liberty to accept the repudiation and recover interest

on the amount awarded in excess of the amount paid into Court. We submit that if this is true it means that the repudiation of the contract had the effect of releasing the landowner from the contract obligation to forego compensation for delayed payment while at the same time he had the right to insist that the agreed valuation in the valid contract be the amount awarded as compensation for the land as of the date of the taking.

V.

The Court says in its opinion: "The landowners are not entitled to insist upon provisions of the contract favorable to them while rejecting others which are unfavorable." We submit that in so saying the Court apparently overlooked the fact that the so-called **unfavorable** provision to the landowner being the provision entitling the Government to immediate possession was linked with and compensated for by the **favorable** provision being for payment of the agreed valuation at the time of instituting the suit, and that that valuation not having been paid as and when provided and the failure to so pay it having been due to deliberate repudiation, the contract right to possession was forever forfeited by the Government because by the lapse of time it had become impossible for the Government to pay the agreed valuation as and when provided, whereas it was still possible for the award in condemnation to be fixed at the contract price and the landowner had the right to insist upon it, the Government itself having forfeited its contract right of possession and the landowner having thereby become entitled to compensation for being deprived of both the use of the land and the use of its equivalent in money for the time between the taking and payment.

VI.

The Court apparently overlooked the fact that this is essentially a condemnation proceeding and not one for performance of the contract. The Supreme Court in the Muschany and Andrews cases said:

> "Judgments were entered upon a Declaration of Taking which vested title in the United States."

In the case at bar the contract valuation is $52,000.00, which is far in excess of the jurisdictional amount in suits for specific performance in the United States District Court. (See 28 U. S. C. A., Sec. 41, Paragraph 20; also see Hammond Nolton v. United States, 121 Fed. [2d] 192, l. c. 202, 314 U. S. 694.) Under those circumstances the District Court would not have had jurisdiction to grant a decree of performance of the contract.

Conclusions.

Wherefore, Appellee respectfully prays that a rehearing of this cause be granted and that upon such rehearing an affirmance of the judgment be accorded.

Respectfully submitted,

SAMUEL M. WATSON,
Attorney for Appellee, Q. W. S. S. Realty and Investment Company.

Certificate of Counsel.

Samuel M. Watson, attorney for the above named appellee, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

Samuel M. Watson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 24, 1946.

[fol. 330] (Order denying Petition of Appellee for Rehearing in Cause No. 13,226.)

March Term, 1946.

Tuesday, April 30, 1946.

Petition for rehearing filed by appellee in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

April 30, 1946.

IN THE

United States Circuit Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 13,223.

UNITED STATES OF AMERICA, Appellant,

vs.

EDGAR S. ALBRECHT et al., Appellees.

No. 13,226.

UNITED STATES OF AMERICA, Appellant,

vs.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, Appellee.

No. 13,227.

UNITED STATES OF AMERICA, Appellant,

vs.

EDWARD J. LINNENBRINGER et al., Appellees.

No. 13,228.

UNITED STATES OF AMERICA, Appellant,

vs.

DENNIS B. PITMAN et al., Appellees.

Appeals from the District Courts of the United States for the Eastern District of Missouri, Eastern Division, Judges George H. Moore and R. M. Duncan, Presiding.

PETITION FOR REHEARING FOR APPELLEE EDWARD J. LINNENBRINGER.

To the Court of Appeals for the Eighth Circuit and the Judges thereof:

Comes now Edward J. Linnenbringer, the appellee in the above entitled cause, and presents this, his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

The Court erred in holding that: "By their unsuccessful defense of the validity of the purchase contract, the

landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract" for the reason that this holding overlooks the nature of this proceeding and the various acts performed by the appellant in this proceeding. The United States instituted this proceeding pursuant to the Declaration of Taking Act, 40 U. S. C. A. 258a-258c. At all times, the United States conducted the proceeding as one pursuant to the Declaration of Taking Act. A Declaration of Taking was filed and $16,000.00 was deposited in the District Court under the Declaration of Taking. It was the United States, and not the appellee, who filed the "Motion For Judgment For Plaintiff In Condemnation And For Defendant Fixing Compensation By Option" (R. 154).

It should be noticed that pursuant to its "Motion For Judgment" in which it sought to fix the compensation at the option price, the United States, on May 17, 1945, deposited an amount of $18,000 in the registry of the District Court in addition to the $16,000 it had theretofore deposited. This $18,000 was deposited by the United States on its own motion and initiative before the District Court entered judgment (opinion filed June 8, 1945). The significance of this voluntary action by the United States cannot be overlooked. It entirely precludes any contention that it was the landowner who "converted" the action from one in condemnation to one on a contract. It was the United States, not the appellee, which was insisting that the option price determined the "compensation." There was no election by the landowner, who at all times took the position that this was a condemnation proceeding which under the facts of withholding the price after acquisition of possession required the payment of interest in order to render just compensation. As a matter of fact, after the United States' motion and deposit of the total of $34,000 in the registry of the Court, there was, as

far as the option was concerned, nothing for the landowner to elect. The agreed valuation of the land (which was fixed by the option and which is to be distinguished from just compensation) was deposited by the United States, and after that, there was certainly nothing the landowner could do, or did do, that in any way affected the nature of the proceeding. The United States simply and properly recognized that in this condemnation proceeding which it instituted that it was bound by the agreed price or valuation of the land. This was not even a situation where the United States refused to recognize that it was bound by the option price as to the value of the land at the time of taking and forced the landowner to prove such value. Here the Government in this condemnation proceeding by its own act and initiative settled this phase of the question. No act of the appellee in any way converted or could convert the proceeding to one other than a proceeding under the Declaration of Taking Act. All that the appellee demanded was that interest be paid as required by law from the date of taking possession.

II.

The Court erred in reversing the judgment of the District Court in the above entitled cause and in affirming the judgment of the District Court in Oliver v. United States (No. 13,154), decided the same day, for the reason that if as this Court held (which holding, however, is assigned as error by appellee herein under Ground I) the defense of this appellee converted this cause from a condemnation proceeding to an action on a contract or obligation, then neither the District Court in the instant cause nor the District Court in Oliver v. United States (No. 13,154) had any jurisdiction. The Tucker Act, 28 U. S. C. A., Sec. 41 (20), grants District Courts jurisdiction of claims against the United States based upon contract only

when the claims involved do not exceed $10,000. That Act provides:

> "Sec. 41. The district courts shall have original jurisdiction as follows:
>
> • • • • • • •
>
> "(20) Suits against United States concurrent with the court of claims, of all claims not exceeding $10,000 founded upon the constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable. • • •"

The requirement as to amount is jurisdictional and one upon which the courts, of their own motion, must insist. Hammond-Knowlton v. United States, 121 F. (2d) 192, 202, cert. denied 314 U. S. 694, 62 S. Ct. 410, 86 L. Ed. 555. Inasmuch as the price of the land (not just compensation) fixed by the option for the land in the instant cause is $34,000 and in Oliver v. United States is $70,000, the District Court would not have jurisdiction to consider suits to enforce these contracts. On the other hand, a condemnation proceeding by the United States pursuant to the Declaration of Taking Act and other condemnation statutes is not a suit founded upon a claim against the United States. An integral part and a necessary step in such condemnation proceeding is the determination of the value of the land and of the just compensation due the landowner. Irrespective of whether the just compensation exceeds $10,000, the District Court has jurisdiction. By recognizing that the District Court below in the instant case and in Oliver v. United States (No. 13,154) did have jurisdiction this Court properly recognized that these proceed-

ings were definitely proceedings pursuant to the Declaration of Taking Act. The District Court having jurisdiction and the proceedings being condemnation proceedings pursuant to the Declaration of Taking Act, the District Court properly allowed this appellee interest as required by the Declaration of Taking Act. This Court erroneously held that appellee converted the action to one on contract, and this holding is in conflict with this Court's recognizing that the District Court had jurisdiction.

III.

The Court erred in distinguishing United States v. Baugh, 149 F. (2d) 190, "on the ground that the contract there involved was interpreted by the court as fixing only the fair value of the land for the purpose of a condemnation then proceeding." This attempted distinction overlooks material matters of fact and law. It should be noted that the stipulation involved in United States v. Baugh, supra, specifically designated the agreed sum as "just compensation." It provided that the court be authorized to enter final judgment "adjudging just compensation for the lands taken, to be in the sum of * * *." The option in the instant case did not fix, or endeavor to fix, just compensation. At all times, the option fixed only the "purchase price" or "agreed valuation" of the land. The option here involved provided that the government agreed that the "purchase price" of $34,000.00 would be paid by it to the landowners upon the furnishing of a certificate of title. The option further provided:

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valua-

tion * * * and will upon filing its petition in such proceedings deposit said agreed purchase price * * *."

This Court's attempted distinction of United States v. Baugh, 149 F. (2d) 190, becomes meaningless when the express langnuage of the option here involved, referring to the amount as the "agreed valuation" and agreed "purchase price," is read and compared with the language used in the stipulation in United States v. Baugh, 149 F. (2d) 190, which refers to the amount there as "just compensation." There is a direct conflict between the decision of this Court and the decision of the Circuit Court of Appeals for the Fifth Circuit.

IV.

The opinion of this Court renders an interpretation of the decision and opinion of Muschany v. United States, 324 U. S. 49, which is in conflict with the decision and opinion of the Supreme Court of the United States in that case. This court properly held that Muschany v. United States established the validity of the contract so far as the purchase price or value of the land is concerned. From this, however, the court concluded that the landowners by insisting on the validity of the agreed valuation or purchase price were precluded from demanding interest because the contract made no provision for interest but fixed a price which was the "equivalent of just compensation" aside from ignoring the fact that the option did not fix "just compensation," but only fixed the price or valuation of the land, this conclusion also ignores what actually happened in Muschany v. United States. There is nothing in Muschany v. United States which precludes the payment of interest. Indeed, the District Court in Muschany v. United States in the judgment under review by the Supreme Court provided for the payment of interest. The Supreme Court of the United States in reversing the

Circuit Court of Appeals gave the effect of reinstating the judgment of the District Court requiring the payment of interest. Thus the actual effect of Muschany v. United States is that interest is properly allowed in such an instance as here presented.

V.

The Court erred in holding: "The allowance of interest upon the condemnation stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation. * * * 'interest does not run upon claims against the Government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353." In Smyth v. United States the Supreme Court of the United States was not concerned with a factual relation at all comparable with the facts here presented. This Court even recognizes that the facts here involved do not actually present a situation where interest would constitute damages for delay in the payment of an obligation because by the use of the word "tantamount" this Court clearly shows a recognition that the present situation is not allowing damages for delay in payment of an obligation (Smyth v. United States, 302 U. S. 329), because it was not concerned with a condemnation proceeding, does not control the interest situation. In addition that case specifically recognized that because of constitutional requirements condemnation proceedings allowed interest. Moreover, the reliance on the inapplicable Smyth v. United States, 302 U. S. 329, ignores the repeated distinctions drawn by the Supreme Court between condemnation proceedings and other types of proceedings. Thus in United States v. North American Transp. & Trading Co., 253 U. S. 330 (cited and relied upon in Smyth v. United States, 302 U. S. 329) a landowner brought a suit on an implied contract in the court

of claims and sought interest. The Supreme Court in holding that interest was not allowable pointed out (l. c. 337) that interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land." The Supreme Court has repeatedly pointed out that United States v. North American Transp. & Trading Co. was not a condemnation proceeding and that while interest was not allowable there, it is allowable in condemnation proceedings. Thus in Jacobs v. United States, 290 U. S. 13, the Court in allowing interest said (l. c. 18):

> "The case of United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 S. Ct. 518, supra, cannot be regarded as establishing a different rule for the instant case. See Seaboard Air Line R. Co. v. United States, supra (261 U. S., p. 305, 676 L. ed. 669, 43 S. Ct. 354); Phelps v. United States, supra (274 U. S., pp. 343, 344, 71 L. ed. 1084, 1085, 47 S. Ct. 611). The North American Transp. & Trading Co. case rested upon its special facts. * * * The court said that the suit was not founded upon the Fifth Amendment. 253 U. S., pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point."

The court in the instant case has inadvertenly overlooked this distinction between a suit brought by the United States (which is the situation here involved) and the situation presented in Smyth v. United States, supra, and United States v. North American Transp. & Trading Co., supra, with the result that the decision and opinion by this Court is in conflict with numerous decisions of the Supreme Court.

VI.

The Court erred in that its opinion and decision inadvertently overlooks the law of estoppel. In the instant case the landowner in reliance on an agreed purchase price and valuation of the land and on a performance of the option in accordance with its terms, changed his position to his detriment by relinquishing possession of the land to the government. After the government got possession of the land it repudiated the contract in such a way that the contract could never be fully performed. The defense of the landowner to the condemnation proceeding instituted by the United States was purely one that the purchase price and valuation had been fixed by the option and that the United States was estopped to deny the amount as the value of the land at the time possession was obtained. Cases setting forth the law of estoppel were cited by appellee at page 16 of his brief. Inasmuch as the option fixed the value as of the time the United States took possession and since the United States did not deposit the full amount of the value in the registry of the court, the appellee pursuant to the requirements of the Declaration of Taking Act is entitled to interest on $18,000 at the rate of 6% from June 18, 1941 to May 17, 1945.

Wherefore, upon the foregoing grounds, it is respectfully argued that this petition for a rehearing be granted and that the judgment of the District Court be upon further consideration affirmed.

Respectfully submitted,

WM. WAYE, JR.,
ROSCOE ANDERSON,
WM. R. GILBERT,
Attorneys for Appellee, Edward J. Linnenbringer.

Certificate of Counsel.

We, counsel for the above named appellee, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Wm. Waye, Jr.,

Roscoe Anderson,

Wm. R. Gilbert,
Counsel for Appellee, Edward J. Linnenbringer.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 24, 1946.

[fol. 341] (Order denying Petition of Appellee Edward J. Linnenbringer for Rehearing in Cause No. 13,227.)

March Term, 1946.

Tuesday, April 30, 1946.

Petition for rehearing filed by appellee Edward J. Linnenbringer in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

April 30, 1946.

IN THE

United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,
vs.
DENNIS B. PITMAN and MAY DELL PITMAN,
Appellees.
No. 13,228.

Appeal from the District Court of the United States for the Eastern District of Missouri, Eastern Division, Hon. George H. Moore, Judge.

APPELLEES' PETITION FOR A REHEARING.

Come now Dennis B. Pitman and May Dell Pitman, appellees in the above entitled cause, and file this, their petition for a rehearing of said cause, and pray that the Court grant them a rehearing of said cause, and as grounds for their said petition state that on May 8, 1946, in a memorandum opinion filed, the Court reversed the judgment of the District Court in this cause for the reasons stated by the Court in its opinion filed on that day in the cause of Lola Castlio Oliver and A. Ray Oliver, her husband, Mrs.

B. I. Castlio (also known as B. Irene Castlio), appellants, v. United States of America, appellee, No. 13,174 (hereinafter referred to as the Oliver case); and that in its opinion in said Oliver case, wherein the Court has, in effect, decided the instant case, the Court has inadvertently overlooked material matters of law and fact, and its decision is contrary to controlling decisions of the Supreme Court of the United States, as follows:

(1) In holding in its opinion in the Oliver case that the landowners are not entitled to interest because the original contract between them and the United States does not contain a provision for the payment of interest nor fix the time for the payment of the "stipulated consideration," the Court has inadvertently overlooked the following, namely, that when the United States instituted the condemnation proceeding the contract, if valid, operated merely to fix the amount of the award in said proceeding, **thereby performing the same function that would otherwise have been performed by commissioners or a jury**; and that when the Supreme Court sustained the validity of the contract (Muschany et al. v. United States, 324 U. S. 49, 65 S. Ct. 442), the valuation agreed upon in the contract became the "amount finally awarded as the value of the property as of the date of the taking," within the purview of the Declaration of Taking Statute, 40 U. S. C. A., Sec. 258a, by the express terms whereof the landowners are entitled to interest on so much of such final award as was not paid into court at the time of the filing of said Declaration of Taking.

(2) In holding in its opinion in the Oliver case that the landowners are not entitled to interest on so much of the amount finally awarded in the condemnation proceeding as was not paid into the registry of the court at the time of the filing of the Declaration of Taking, the Court has in-

advertently overlooked the legal effect of the filing of the Declaration of Taking and the entry of judgment thereon, vesting absolute title in the United States; that thereby there was a taking of the landowners' property within the meaning of the Fifth Amendment and the statute as well (40 U. S. C. A., Sec. 258a); and that "given such a taking, the right to interest or a fair equivalent attaches itself automatically to the right to an award of damages" (Shoshone Tribe of Indians v. United States, 299 U. S. 476; Jacobs v. United States, 290 U. S. 13. Appellees respectfully submit that the Court's said opinion is in direct conflict with these decisions of the Supreme Court.

(3) In holding in its opinion in the Oliver case that the landowners are not entitled to interest because "by their successful defense of the validity of the purchase contract the landowners converted the condemnation proceeding from an ordinary adverse proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract," the Court has inadvertently overlooked the fact that the Supreme Court of the United States in Muschany et al. v. United States, 324 U. S. 49, l. c. 51, 65 S. Ct. 442, l. c. 444, has definitely recognized that the pleading by the landowners of the contracts in these cases wrought no change in the condemnation proceedings, but that such contracts were relied upon merely as fixing the amount of the respective awards in such proceedings at the agreed valuation. The Supreme Court (324 U. S., l. c. 51) said: **"The contracts were pleaded by petitioners as defendants in eminent domain suits to establish the proper condemnation award."**

(4) In holding in its opinion in the Oliver case that the landowners are not entitled to interest for the reason that, "in the absence of a statute or express contract providing for it, interest cannot be added to an obligation of the

United States," the Court has inadvertently overlooked the nature of the landowners' claim for interest which, while consistent with the contract, is not founded upon the contract, but upon a statute expressly providing for the payment of interest, namely, the Declaration of Taking Statute, 40 U. S. C. A., Sec. 258a.

(5) In holding in its opinion in the Oliver case that the landowners are not entitled to interest the Court has inadvertently overlooked the fact that when the Government, in attempted repudiation of the contract resorted to condemnation, invoking the Declaration of Taking Statute (40 U. S. C. A., Sec. 258a), such proceeding—except for the fixing of the award therein at the agreed valuation—differed in no respect from the ordinary condemnation proceeding; that the landowners as well as the Government were entitled to all the benefits flowing from the statute; and that the Government, having invoked the statute and accepted its benefits, is estopped to deny its obligation to pay interest as required thereby.

(6) And in ruling in the Oliver case that the landowners were not entitled to interest on the ground that by insisting upon the validity of the contract they, in effect, converted the condemnation suit into one for the recovery by them on a contract obligation of the United States, and in making that the basis of its decision in the instant case, the Court has inadvertently overlooked the fact that since the amount involved in each of said cases exceeded $10,000.00, the District Court would have had no jurisdiction of a suit by the landowners on the contract. The District Court has only such jurisdiction of claims against the United States as is conferred by the Tucker Act, 28 U. S. C. A., Sec. 41, Subd. 20, by the express terms whereof that court has no jurisdiction of a suit against the United States on a contract where the amount involved exceeds the sum

of $10,000.00. Hammond-Knowlton v. United States, 121 Fed. (2) 192, certiorari denied 314 U. S. 694.

Wherefore, appellees pray that the Court grant them a rehearing of this cause.

Respectfully submitted,

WM. H. ALLEN,
Counsel for Appellees.

Certificate of Counsel.

Wm. H. Allen, counsel of record for appellees in the above entitled cause, hereby certifies that the above and foregoing petition of appellees for a rehearing of said cause is filed in good faith and is believed by him to be meritorious.

Wm. H. Allen,
Counsel for Appellees.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 22, 1946.

[fol. 347] (Order denying Petition of Appellees for Rehearing in Cause No. 13,228.)

March Term, 1946.

Tuesday, April 30, 1946.

Petition for rehearing filed by appellees in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

April 30, 1946.

[fol. 348] (Motion of Appellees to Stay Issuance of Mandate in Cause No. 13,223.)

Comes now the appellees in the above entitled cause, Edgar S. Albrecht and Geraldine Albrecht, his wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, and move the Court to stay the issuance of its mandate herein for thirty days from April 30, 1946, the date of the denial herein of appellees' petition for rehearing, and thereafter until final disposition of said cause by the Supreme Court of the United States, provided that within such stay, there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the petition for certiorari, record, and brief have been filed, as provided by Rule 16 of this Court.

And in support of this motion the said appellees state that they will in good faith file in the Supreme Court of the United States a petition for writ of certiorari to review the judgment of April 9, 1946, reversing the judgment of the District Court, and the order and judgment of April 30, 1946, over-ruling and denying appellees' petition for a rehearing in this cause.

Wherefore, appellees respectfully pray that the issuance of the mandate of this Court be stayed and with-held for thirty days and that if within such stay there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court that the petition for certiorari, record, and

brief have been filed, such stay shall continue until final disposition by the Supreme Court.

GEORGE EIGEL,
722 Chestnut Street,
St. Louis 1, Missouri,
Attorneys for Appellees Albert W. Albrecht, Jr., and Virginia Albrecht, his wife.

[fol. 349]

RICHMOND C. COBURN,
IGOE, CARROLL, KEEFE AND COBURN,
1530 Boatmen's Bank Building,
St. Louis 2, Mo.
Attorneys for Appellees Edgar S. Albrecht and Geraldine Albrecht, his wife.

Receipt of service of the above petition to stay the mandate, and of a copy of said petition, is hereby acknowledged this 8th day of May, 1946.

C. J. HUGHES,
Spec. Asst. United States Attorney, St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 8, 1946.

(Order Staying Issuance of Mandate in Cause No. 13,223.)

May Term, 1946.

Friday, May 10, 1946.

On Consideration of the motion of the appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Su-

preme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 10, 1946.

[fol. 350] (Petition of Appellee for Stay of Issuance of Mandate in Cause No. 13,226.)

Comes now the appellee in the above entitled cause and respectfully shows unto the Court:

That on April 9, 1946, this Court entered and recorded its decision reversing the decree of the District Court therein; and

That thereafter, the appellee herein filed its petition for rehearing; and

That thereafter, on the 30th day of April, 1946, this Court overruled said petition for rehearing; and

That appellee is [agrieved] in the premises and is desirous of a review by the United States Supreme Court of the decision of this Court.

Wherefore, appellee respectfully prays the Court to stay the Mandate in this cause for thirty (30) days to enable appellee to apply in accordance with the statutes of the United States and the rules of this Court and the Supreme Court of the United States in such cases made and provided to the Supreme Court for a writ of certiorari to review the decision of this Court in this cause.

Respectfully submitted,

SAMUEL M. WATSON,
Attorney for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 8, 1946.

[fol. 351] (Order Staying Issuance of Mandate in Cause No. 13,226.)

May Term, 1946.

Friday, May 10, 1946.

On Consideration of the motion of the appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 10, 1946.

[fol. 352] (Motion of Appellee Edward J. Linnenbringer for Stay of Issuance of Mandate in Cause No. 13,227.)

Comes now Edward J. Linnenbringer, the appellee in the above entitled cause, and moves this Court to stay its mandate for the reason that this appellee is desirous of filing in the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of April 9, 1946 and order of April 30, 1946 denying a petition for rehearing of this Court in the above matter.

Wherefore, appellee prays that the mandate of this Court be stayed and withheld for thirty days and that if within such stay there is filed with this Court a certificate of the Clerk of the Supreme Court that the petition for

certiorari, record and brief have been filed such stay shall continue until final disposition by the Supreme Court.

WM. WAYE, JR.,
First National Bank Building,
St. Charles, Missouri,

W. R. GILBERT,
ROSCOE ANDERSON,
705 Olive Street,
St. Louis 1, Mo.
Attorneys for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 8, 1946.

[fol. 353] (Order Staying Issuance of Mandate in Cause No. 13,227.)

May Term, 1946.

Friday, May 10, 1946.

On Consideration of the motion of the appellee, Edward J. Linnenbringer, for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here Ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 10, 1946.

[fol. 354] (Motion of Appellees for Stay of Issuance of Mandate in Cause No. 13,228.)

Come now Dennis B. Pitman and May Dell Pitman, appellees in the above entitled cause and state that they desire to apply to the Supreme Court of the United States for a writ of certiorari to review the decision of the Court in said cause, as shown by the Court's opinion rendered

herein on April 9, 1946, and move and pray that an order be made staying and withholding the mandate of this Court in said cause pending appellees' said application for said writ, in accordance with the Rules of this Court in such cases made and provided.

Respectfully submitted,

WM. H. ALLEN,
Counsel for Appellees.

Service of copy of within motion is acknowledged this 8th day of May, 1946.

C. J. HUGHES,
Spec. Asst. U. S. Atty.
Counsel for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 8, 1946.

[fol. 355] (Order Staying Issuance of Mandate in Cause No. 13,228.)

May Term, 1946.

Friday, May 10, 1946.

On Consideration of the motion of the appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 10, 1946.

[fol. 356] (Clerk's Certificate.)

United States Circuit Court of Appeals

Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcripts of the records from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein the United States of America was Appellant and Edgar S. Albrecht, et al., were Appellees, No. 13,223, the United States of America was appellant and Q. W. S. S. Realty and Investment Company, a Corporation, was Appellee, No. 13,226, the United States of America was Appellant and Edward J. Linnenbringer, et al., were Appellees, No. 13,227, and the United States of America was Appellant and Dennis B. Pitman, et al., were Appellees, No. 13,228, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 20th day of May, A. D. 1946,

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 356] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 148

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 357] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 149

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 358] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 150

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 359] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 155

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 151

A. RAY OLIVER, EXECUTOR OF THE ESTATE OF LOLA CASTLIO OLIVER, DECEASED, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

No. 13,174.
CIVIL.

A. RAY OLIVER, AS EXECUTOR OF THE ESTATE OF LOLA CASTLIO OLIVER, DECEASED, AND A. RAY OLIVER, HER HUSBAND, AND MRS. B. I. CASTLIO, (ALSO KNOWN AS B. IRENE CASTLIO), APPELLANTS,

VS.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 13, 1945.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the March Term, 1946, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 13th day of October, A. D. 1945, a transcript of record pursuant to an appeal taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Lola Castlio Oliver and A. Ray Oliver, her husband, and Mrs. B. I. Castlio, (also Known as B. Irene Castlio), were Appellants and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Notice of Appeal.

(Filed August 14, 1945.)

In the United States District Court
Eastern District of Missouri
Eastern Division.

United States of America,
Plaintiff,
v.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al.,
Defendants.
} Docket No. 960 At Law.

Notice is hereby given that Lola Castlio Oliver, A. Ray Oliver, her husband, and B. Irene Castlio, defendants in the above entitled cause, hereby appeal to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 14th day of May, 1945.

Dated this 14th day of August, 1945.

IGOE, CARROLL, KEEFE & COBURN,
ROBERT V. NIEDNER,
ROBERTS P. ELAM,
Attorneys for Lola Castlio Oliver, A. Ray Oliver, Her Husband, and B. Irene Castlio.

[fol. 2] Docket entry showing filing of notice of appeal, and mailing copy of such notice to United States Attorney.

(August 14, 1945.)

Notice of appeal of Lola Castlio Oliver, et al defendants to the United States Circuit Court of Appeals, 8th Circuit from judgment entered herein on May 14, 1945, filed. Copy of such notice this day mailed to United States Attorney as directed by appellant.

[fol. 3] (Motion of United States of America for Leave to file Petition and for Order for Summons.)

(Filed June 6, 1941.)

In the United States District Court

Eastern District of Missouri,

Eastern Division.

United States of America, Plaintiff, vs. Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al., Defendants.	Docket No. 960 At Law. Tract No. 254.

Comes Now the United States of America by Harry C. Blanton, United States Attorney for the Eastern District of Missouri, and moves the Court for permission to file the above-entitled proceeding to condemn certain real estate as in said petition described and asks that this

Court enter an order permitting the filing of said petition and directing summons to issue to the defendants named therein.

Respectfully submitted,

HARRY C. BLANTON,
United States Attorney.

(Order)

Motion for leave to file the petition for condemnation in the above-entitled proceeding is granted and the petition ordered filed;

And It Is Hereby Further Ordered and Directed that the Clerk of this Court shall issue summons and notice to the defendants and each of them as named in the petition for condemnation filed in the above-entitled cause to appear before the Judge of this Court at the United States Court House in the City of St. Louis, State of Missouri, on the 14th day of July, 1941 at 10:00 in the forenoon, then and there to answer the petition of the United States of America and at which time and place said petition will be heard;

And It Is Hereby Further Ordered and Directed that inasmuch as this is a proceeding for the condemnation of property under the power of eminent domain, the procedure for the service of said summons and notice is not governed by Rule No. 4 of the New Rules of Civil Procedure for the District Courts of the United States; that said rule is not applicable to the service of such summons and notice; and that in the service of summons and notice herein, plaintiff is authorized to follow its former practice.

GEO. H. MOORE,
United States District Judge.

Dated this 6th day of June, 1941.

Endorsed; Filed: Jan 6 1941 Jas. J. O'Connor, Clerk.

[fol. 4] (Petition in Condemnation.)

(Filed June 6, 1941.)

In the United States District Court
Eastern District of Missouri
Eastern Division

Petition in Condemnation

United States of America, Plaintiff,

vs.

Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and

Docket No. 960
At Law.
Tract No. 254

Lola Castlio Oliver

Mrs. B. I. Castlio

A. Ray Oliver

Collector of Revenue of St. Charles County, Missouri

County of St. Charles, State of Missouri

All Other Unknown Owners of all that tract of land in St. Charles County, Missouri, Known as Tract No. 254, and more particularly described herein;

Defendants.

[fol. 4-A] To the Honorable, the Judges of the United States District Court for the Eastern District of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and A. G. Edwards, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Secretary of

War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized and empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in fee simple absolute of the land hereinafter described and the title thereto, which real estate is located as afore-[fol. 5] said, and is authorized and directed to be brought by the Secretary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257); and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940, (Public No. 667—76th Congress); and the Act of Congress approved September 24, 1940, (Publ. Ros. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United

States and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

(Description of property omitted pursuant to stipulation as to record on appeal)

[fol. 6] (B)

That the following defendants own or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

Lóla Castlio Oliver
Mrs. B. I. Castlio
A. Ray Oliver

[fol. 7] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Collector of Revenue of St. Charles County, Missouri, are, therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands, each claim and assert, or may claim and assert a reversionary interest in and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and claimants to easements in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendant, as hereinabove specifically named, if known, and if unknown, such unknown persons by the description of the "Unknown Owners" of the land herein described and to be condemned, to the end that they may come into court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

Eleventh: That your petitioner has attempted to set forth the interest or estates of all persons, firms and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporation having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that all of their rights, title, interests and estate, whatever it [fol. 8] may be, to all and singular, the premises above mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident de-

fendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts [appropos] to this proceeding and the provisions of the law applicable thereto, under which this action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants; that the Court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that these defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court, upon the filing of this petition, will make an order pursuant to the Act of Con-
[fol. 9] gress approved February 26, 1931, (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servants, agents and employees, may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interests therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the

aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief in the premises to which this petitioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By HARRY C. BLANTON,
United States Attorney for the Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri,

A. G. EDWARDS,
Special Assistant to the United States Attorney,
410 New Federal Building,
St. Louis, Missouri.

[fol. 10] United States of America }
Eastern District of Missouri } ss.

Before me, the undersigned, personally appeared Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the petition.

HARRY C. BLANTON.

Subscribed and sworn to before me, this 6th day of June 1941.

JAMES J. O'CONNOR,
Clerk of U. S. District Court in and for the Eastern District of Missouri,
By RUBY BARHAM,
(Seal) Deputy.

Endorsed; Filed: Jun 6 1941. Jas. J. O'Connor, Clerk.

[fol. 11] (Declaration of Taking.)

(Filed June 6, 1941.)

In the
United States District Court
In and For the Eastern District of Missouri.

United States of America,
Petitioner,
vs.
675.96 Acres of Land, More or Less, Situate in St. Charles County, State of Missouri, and Lola C. Oliver et al,
Defendants.
Case No. 960.

To the Honorable,
The United States District Court:

I, Henry L. Stimson Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U. S. C. sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act of Congress approved June 26, 1940 (Public No. 667—76th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for other uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

[fol. 12] 2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 29th day of May, A. D. 194 , in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

[fol. 13] Schedule "A".

The land which is the subject matter of this Declaration of Taking and of this condemnation aggregates 675.96 acres, more or less, situate and being in the County of St. Charles, State of Missouri. A Description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Tract 254

Parcel No. 1

Description:

A tract of land being a part of fractional Sections 22, 23 and 27 and part of U. S. Surveys No. 56 and 296, Township 46 North, Range 2 East, described as follows: Beginning at a point where the section line between fractional sections 22 and 23 of said Township 46 North, Range 2 East, intersects the south line of U. S. Survey No. 296; thence along the south line of said survey south 80° West, 10.60 chains; thence North 10° 30′ West 24.25 chains; thence North 79° 30′ East 18.49 chains; thence North 29° 30′ West 18.00 chains, more or less, to the center of Krout Run Creek; thence the following courses along said creek: North 22° 15′ East 2.42 chains; thence North 74° 45′ East 4.96 chains; thence North 35° East 1.25 chains; thence North 33° 15′ West 1 chain to a point on the north line of Lot No. 7, as the same is designated on the plat of subdivision, of the real estate of John W. Nelson, deceased; thence North 81° 30′ East 18.77 chains; thence North 6° East 20.63 chains; thence South 74° West 20.79 chains; thence North 10° West 13.37 chains to the center of Dardenne Creek; thence up said Dardenne Creek the following courses and distances along the southern line of the Hoecklemann tract as follows: South 75° West 4.00 chains; thence North 70° West 2.00 chains; thence North 57° West 5.00 chains; thence North 84° West 9.50 chains; thence South 64° 30′ West 3.00 chains; thence South 27° 30′ West 4.70 chains; thence South 21° West 3.00 chains; thence South 36° West 5.27 chains; thence North 60° 30′ West 4.33 chains; thence North 70° West 7.00 chains; thence South 50° West 10.00 chains; thence South 65° West 5.85 chains; thence South 54° 45′ West 7.50 chains; thence East 6.40 chains, more or less, to a point on the West line of U. S. Survey No. 296; thence along said Survey line South 9° East 14.30 chains; thence North 81° East 22.98 chains; thence South 29° East 14.04 chains to the center of Krout Run Creek; thence along said creek the following courses; South 20° 15′ West 10.45 chains; South 25°

30′ West 10.00 chains; South 42° 15′ West 1.00 chain;
[fol. 14] thence South 20° West 5.50 chains; South 37° East 9.26 chains; thence South 15° 15′ East 12.23 chains to a stone in the center of a County Road; thence South 7° 30′ East 10.09 chains; thence East 20.24 chains to a point on line between fractional Sections 26 and 27, Township 46 North, Range 2 East; thence North 1° 30′ East, along said Section line 18.11 chains to the place of beginning, said land being situated in St. Charles County, Missouri, and containing 300.73 acres, more or less.

Parcel No. 2

The eastern part of Lot 1 and all of Lot 4 of the division of land belonging to the estate of James F. Howell, deceased, more particularly described as follows:

Beginning at the Northeast corner of said Lot 4, being also the Northeast corner of U. S. Survey 887, thence South 7½° West 31.90 chains to the Southeast corner of said U. S. Survey 887; thence North 82½° West 34.84 chains to the Southwest corner of said lot 4; thence North 7½° East 12.24 chains to South line of lot 1; thence North 53° West 5.83 chains; thence North 6½° West 7.61 chains to corner, being the Southeast corner of land formerly owned by John Fritz; thence North 7½° East 16.80 chains to corner, being the Northwest corner of said lot 1; thence South 82½° East 10.50 chains to corner in Rutgers line; thence with said line South 27° East 9.39 chains to corner; thence South 82½° East 21.50 chains to place of beginning, said land being situated in St. Charles County, Missouri, and containing 125.25 acres, more or less, according to and being the same land as conveyed to Douglas Porter recorded in Book 15, Pages 320 and 321, St. Charles County, Missouri.

Parcel No. 3

A tract of land described as located partly within U. S. Survey 3106 and being more particularly described as follows:

Commencing at the corner in the line between U. S. Survey 476 and U. S. Survey 3106 at a distance of 2.75 chains South 22° West from the Northeast corner of said Survey 476, running thence from said point, North 86° 58′ East 6.92 chains; thence North 55° 03′ East 22.39 chains; thence South 67° 12′ East 35.26 chains to the point of beginning of the land herein described; thence South 62° West 5.02 chains; thence South 78° 30′ West 6.73 chains; thence West 5.54 chains; thence South 57° 30′ West 3.56 chains; thence South 17° 30′ West 7.82 chains; thence South 23° 30′ East 8.56 chains; thence North 75° East 3.78 [fol. 15] chains; thence North 64° East 6.81 chains; thence North 60° 45′ East 3.84 chains; thence North 59° 30′ East 10.30 chains; thence North 71° East 2.18 chains; thence North 88° East 3.70 chains; thence East 2.31 chains; thence North 75° East 5.50 chains; thence North 73° East 2.21 chains; thence North 29° 30′ East 7.58 chains; thence North 43° West 5.30 chains; thence North 68° 38′ West 2.51 chains; thence North 89° 49′ West 3.90 chains; thence South 72° 29′ West 2.88 chains; thence South 66° 12′ West 7.79 chains to the point of beginning, said land being situated in St. Charles County, Missouri, and containing 50.36 acres, more or less, said land being the same deeded to Mitchell Castlio, as recorded in Deed Book 56, page 278, St. Charles County, Missouri.

Names of purported owners: Lola Castlio Oliver, Mrs. B. I. Castlio, and A. Ray Oliver.

Estimated Compensation: $21,500.00.

(Description of Tract No. A, and attached plats, omitted pursuant to stipulation as to record on appeal.)

[fol. 16] Order and Judgment on Declaration of Taking.

(Filed June 6, 1941.)

In the United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al., Defendants.	Docket No. 960 Tract No. 254

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter judgment on the Declaration of Taking filed in the above entitled cause on June 6, 1941, and upon consideration of said motion, the condemnation petition filed herein, said Declaration of Taking, the statutes in such cases made and provided, and the Court having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land described in said petition, and also under authority of the Attorney General of the United States:

Second: That said Petition and Declaration of Taking state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United States of America, for the purposes therein set forth;

[fol. 17] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in said Declaration of Taking:

Fourth: That said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use:

Fifth: That a map or plan showing the land taken is annexed to and made a part of said Declaration of Taking:

Sixth: That a statement is contained in said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 254 in the amount of Twenty-one Thousand Five Hundred Dollars and No Cents ($21,500.00), and that said sum was deposited in the Registry of this Court to the use of the persons entitled thereto, upon and at the time of the filing of said Declaration of Taking:

Seventh: That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor.

It Is Therefore Ordered and Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of said Declaration of Taking and depositing in the Registry of this Court of the aforesaid estimated total compensation, which land is situated in St. Charles County, Missouri and described as follows:

(Description of property omitted pursuant to stipulation as to record on appeal.)

[fol. 18] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered and Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the entry of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 6th day of June, 1941.

GEO. H. MOORE,
United States District Judge.

Endorsed: Filed: Jun 6, 1941. Jas. J. O'Connor, Clerk.

[fol. 19] Answer of Defendants, Lola Castlio Oliver, Mrs. B. I. Castlio, and A. Ray Oliver.

(Filed December 23, 1941.)

In the United States District Court,
Eastern District of Missouri
Eastern Division.

United States of America, Plaintiff, -vs- Certain Land, Situate in St. Charles County, State of Missouri, Known as Tract Number 254, and Lola Castlio Oliver, Et-Al. Defendants.	Docket No. 960 At Law Tract No. 254.

1. Now Come Lola Castlio Oliver, Mrs. B. I. Castlio and A. Ray Oliver, defendants in the above entitled cause, and for their answer to plaintiff's petition in condemnation, deny that they were at the time of the institution of this action, or at any time since, the owners of the Fee-Simple Title or any other interest in and to the lands referred to in plaintiff's petition, or that they claim any title or interest therein, and deny that they were at said time, or

at any time since, in possession of said land or any part of it, and assert that they had long prior to the institution of this action, surrendered possession of said land to the plaintiff, pursuant to a valid contract, between plaintiff and the said defendants as will more fully appear hereinafter.

2. Defendants admit that the real estate described in plaintiff's petition is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court, in and for the Eastern Division of the Eastern Judicial District of Missouri.

3. Defendants admit that the plaintiff, the United States of America is empowered to acquire the lands described in plaintiff's petition, but defendants deny that plaintiff [fol. 20] is authorized to acquire said lands in any other way, than under the contract hereinabove referred to; defendants admit that the United States Attorney is acting under instructions from the Attorney General of the United States, but defendants deny, on information and belief that the said Attorney General is acting at the request of the Secretary of War of the United States, and state that the said Secretary of War has no power, right, or authority to acquire the lands described in the plaintiff's petition by condemnation, because of the contract and the possession taken by the plaintiff, as hereinafter described.

4. Defendants admit that this action has for its purpose among other things, the acquiring by condemnation and in fee simple absolute of the land described in plaintiff's petition and the title thereto, which real estate is located as aforesaid, but defendants deny that said action can be brought for any other purpose than that designated in said contract; defendants state that whether or not said action is authorized by the Acts of Congress, referred to in Paragraph "Fourth" of plaintiff's petition is immaterial, and defendants admit that funds have been appropriated for the purpose therein mentioned.

5. Defendants admit that the project referred to in the plaintiff's petition is within the [perview] of the sovereign plaintiff and of the Congress of the United States, and

that the said lands and territory thereby acquired [and] located within the jurisdiction of this Court.

6. Defendants state that they have not information sufficient to form a belief as to what the opinion of the Secretary of War might be as to the necessity and advantage to the plaintiff of acquiring said lands by condemnation, but that said opinion is immaterial in view of the contract, which has been executed by these defendants; defendants admit that the money has been appropriated and is available to pay for said lands.

7. Defendants admit that the lands attempted to be condemned in this action are described correctly in the [fol. 21] plaintiff's petition, but deny that they or any of the other defendants named in plaintiff's petition own or have any interest in said land.

8. Defendants state that whether or not there are located within the tract of land described in plaintiff's petition, certain roads and highways, is immaterial because the plaintiff would become the owner of any reversionary interest in and to the premises occupied as roads and highways, which might be claimed by the defendants upon the acquisition by the plaintiff of the lands described in the plaintiff's petition.

9. Defendants state, neither they nor any other persons named as defendants in the plaintiff's petition, nor any other persons whatever, other than the plaintiff, own or have any interest in the land described in the plaintiff's petition, and that these defendants are the only persons who have any interest in the contract executed by the defendant, as above mentioned, and who are entitled to any compensation from the plaintiff for the taking by the plaintiff and the continued possession by the plaintiff under said contract of said lands.

10. Defendants state neither they nor any other persons named as defendants in the plaintiff's petition, nor any other persons whatever, other than the plaintiff, own or have any interest in the land described in the plaintiff's petition, and that these defendants are the only persons who have any interest in the contract and deed executed

by the defendants as above mentioned, and who are entitled to any compensation from the plaintiff for the taking by the plaintiff and the continued possession by the plaintiff under said contract and deed of said lands.

11. Defendants state that the contract hereinabove referred to was solicited by one R. Newton McDowell, the duly authorized agent of the plaintiff; that the said McDowell, [——] the duly authorized agent for the plaintiff; that the said McDowell solicited these defendants to submit an offer for the sale of the said lands of said de- [fol. 22] fendants and supplied to said defendants, an instrument entitled "Option to Purchase Lands", that on the Twenty-fourth (24th) day of December, 1940, said defendants duly executed said instrument, in which contract they offered to sell to the plaintiff the real estate described in the plaintiff's petition for the sum of Seventy Thousand Dollars ($70,000.00), and returned the same to the said McDowell who in turn delivered it to the plaintiff; thereafter, on the Twenty-eighth (28th) day of December, 1940, the offer so made by said three defendants was duly accepted by and on behalf of the United States of America, by C. J. Harrold, Major Quartermaster Corps, United States Army, duly authorized to act for plaintiff in that connection.

12. That the contract created by said offer and accepted is as follows:—

Option to Purchase Land

Know All Men by These Presents: That the undersigned Lola Castlio Oliver and Mrs. B. I. Castlio, (her mother,) for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their [heiers], executors and assigns, to sell and convey to the Government for the consideration of Seventy Thousand Dollars ($70,000.00) that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

A tract of land being a part of fractional Sections, 22, 23, and 27 and part of U. S. Surveys No. 56 and No. 296 Township 46 North, Range 2 East, described as follows: Beginning at a point where the section line between fractional sections 22 and 23 of said Township 46 North, Range 2 East, intersects the south line of U. S. Survey No. 296; thence along the south line of said survey South 80° W., 10.60 chains; thence N. 10° 30′ W., 24.25 chains; thence N. 79° 30′ E., 18.49 chains; thence N. 29° 30′ W., 18.00 chains, more or less, to the center of Krout Run Creek; thence the following courses along said creek; N. 22° 15′ E., 2.42 chains; N. 74° 45′ E., 4.96 chains; N. 35° E., 1.25 chains; N. 33° 15′ W., 1 chains to a point on the north line of Lot No. 7, as the same is designated on the plat of subdivision, of the real estate of John W. Nelson, deceased; thence N. 81° 30′ E., 18.77 chains; thence N. 6° E., 20.63 chains; thence S. 74° W., 20.79 chains; thence N. 10° W., 13.37 chains to the center of Dardenne Creek; thence up said Dardenne Creek the following courses and distance along the southern line of the Hoecklemann tract as follows: S. 75° W., 4.00 chains; N. 70° W., 2.00 chains; N. 57° W., 5.00
[fol. 23] chains; N. 84° W., 9.50 chains; S. 64° 30′ W., 3.00 chains; S. 27° 30′ W., 4.70 chains; S. 21° W., 3.00 chains; S. 36° W., 5.27 chains; N. 60° 30′ W., 4.33 chains; N. 70° W., 7.00 chains; S. 50° W., 10.00 chains; S. 65° W., 5.85 chains; S. 54° 45′ W., 7.50 chains; thence East 6.40 chains, more or less, to a point on the West line of U. S. Survey No. 296; thence along said survey line S. 9° E. 14.30 chains; thence N. 81° E., 22.98 chains; thence S. 29° E., 14.04 chains to the Center of Krout Run Creek; thence along said creek the following courses: S. 20° 15′ W. 10.45 chains; S. 25° 30′ W., 10.00 chains; S. 42° 15′ W., 1.00 chains; S. 20° W., 5.50 chains; S. 37° E., 9.26 chains; S. 15° 15′ E., 12.23 chains to a stone in the center of a County Road; thence S. 7° 30′ E., 10.09 chains; thence East 20.24 chains to a point on line between

fractional Sections 26 and 27, Township 46 N., Range 2 E., thence N. 1° 30' E., along said Section line 18.11 chains to the place of beginning. A small three sides strip of land in Survey No. 296, containing 24/100 of an acre previously conveyed to J. E. Marsh by these grantors by deed, is hereby [accepted] it being contained within the metes and bounds as given above. The above described tract containing exclusive of said exception 300.73 acres. Also a tract of land containing 80 acres, more or less, being part of survey No. 887 in Township 46 N., Range 3 East, and being the same land conveyed to the said Douglas Porter by deed from Hiram B. Castlio, dated March 14, 1876, to which deed reference is hereby made for a more complete description of said land. Also a tract of land containing 45.25 acres in said Survey No. 887 in Township 46 N., Range 3 East, and being the same land conveyed to the said Douglas Porter by his father Richard Porter to which deed reference is made.

Also a tract of land described in a deed from Louis D. Dozier and wife et al to Mitchell Castlio, dated October 20th, 1891, and recorded in the Recorder's Office of St. Charles County, Missouri, in Book 56, page 278, and following, as an Island in the Missouri River in the Eastern part of U. S. Survey No. 3106 of Township 45 N., Range 3 E., of the 5th Principal Meridian, containing 30 acres, more or less, and as being bounded North and West by what was formerly Femme Osage Creek, and south and east by the Missouri River, together with the accretions thereto formed, and is more particularly described as follows:—Beginning at a stone set in the middle line of the old bed of Femme Osage Creek as mentioned in said deed and at the upper end or [extermity] thereof, from which stone a cottonwood 36 inches in diameter bears N. 12¼° E., distant 63 links; thence following the meanders of the middle of the old bed of said Femme Osage Creek, down the same as

follows, N. 5° E., 4.80 chains to a stone, for corner; thence N. 21¼° E., 2.41 chains to a point on the line of the right-of-way of the Missouri, Kansas and Texas Railway; thence along and with the line of said right-of-way N. 67½° E., 6.21 chains; thence continuing with the middle line of said creek bed, due East 5.54 chains; thence N. 78½° E., 7.63 chains; thence N. 62° E., 5.02 chains; thence N. 69° E., 8.20 chains; thence N. 76° E., 3.04 chains; thence East 2.93 chains; thence S. 66° E., 2.75 chains; thence S. 46¼° E., .00 chains to the lower extremity of said old creek bed, it being the point on what at one time was the bank of the Missouri River; thence S. 49½° E., 3.65 chains
[fol. 24] to a point on the present bank of said river it being at the same time a point on the bank of Femme Osage Creek in low stages of the river; thence up said river bank; S. 29½° W. 7.58 chains to a point in the middle line of said Femme Osage Creek at its usual mouth; thence following the meanders of the said middle line up the creek as follows: S. 73½° W., 2.21 chains; S. 75° W., 5.50 chains West 2.31 chains; S. 88° W., 3.70 chains; S. 71° W., 2.18 chains; S. 59½° W., 10.30 chains; S. 60¾° W., 3.84 chains; S. 64° W., 6.81 chains; S. 75° W., 3.78 chains to a point on the middle line of said creek at a distance of 7.86 chains from the beginning as measured on a [curbe] bearing S. 23½° W., 7.88 chains to the beginning, containing 51.67 acres, more or less.

All of the above several tracts of land containing in the aggregate 478.65 acres.

The Government agrees to assume the easement held by the Ajax Pipe Line Company for a pipeline right of way across a portion of this land. The Government agrees to assume the easement held jointly by Charles W. Quint and Louis Quint, his wife; William Wackler, and Halie Wackler, his wife; Arthur W. Schaefer and Lena Schaefer, his wife; and Henry H. Seib and Hilda Seib, his wife, for a road one rod wide across a portion of this land.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of
[fol. 25] America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at St. Charles, Missouri, this 24th day of December, 1940.

LOLA CASTLIO OLIVER,
MRS. B. I. CASTLIO,
A. RAY OLIVER.

Witness:
M. WILSON.
LT. A. RAY OLIVER, JR.
M. WILSON.

Accepted by and on behalf of the United States of America, this 28th day of December, 1940.

C. J. HARROLD,
[Mayor], Q. M. C.,
United States Army.

13. Defendants assert that if the Attorney General has finally approved the title to said land then and in that event, plaintiff being at the time of the institution of this action the owner of the full and complete fee simple title to the property in [questions] and being at said time in possession thereof, there would be nothing to condemn and

this would be a moot cause, and this Court would have no jurisdiction to proceed therein.

14. That defendants, in reliance upon the aforesaid contract, have surrendered possession to plaintiff and that plaintiff has for a long time past been in possession of said property and has been and is now using the same for its own purposes and benefits and plaintiff is estopped to pro- [fol. 26] ceed in this action contrary to its duties and obligations under said contract and is bound to carry on this proceeding in conformity with the provisions thereof which are expressly applicable hereto.

15. That defendants by this action are denied said agreed compensation for their property without due process of law and equal protection of the laws in violation of Section 1, Article XIV, of the Constitution of the U. S. and are deprived of their property without due process of Law in violation of Section 30, Article II of the Constitution of the State of Missouri.

Wherefore, It is prayed that the Court in its verdict, judgment, and decree fixing the award for the land described in plaintiff's petition at Seventy Thousand ($70,000.00) Dollars, plus interest at Six per cent (6%) from the date of acceptance of said contract above described, to-wit: December 28th, 1940, and requiring plaintiff to deposit said agreed purchase price and interest with the Clerk of this Court, the same to be disbursed by said Officer, pursuant to the decree entered in this proceedings.

ROBERT V. NIEDNER,
206 North Second Street,
St. Charles, Missouri,
Attorney for Defendants.

[fol. 27] Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option.

(Filed April 6, 1945)

In the United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. Certain land situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al., Defendants.	Docket No. 960 At Law

Now comes the plaintiff, the United States of America, by its attorneys, and moves the Court to enter judgment in this cause for the plaintiff for the condemnation of the real estate described in the petition filed in this cause and for defendants fixing defendants' compensation for the taking of said real estate in the amount named in the option, without interest, and as reasons for said motion states:

(1) That this suit was filed by plaintiff to acquire, by condemnation, the real estate described in the petition filed in this cause, that a Declaration of Taking was filed and the sum of $21,500.00 was deposited in the Registry of the Court as the estimated just compensation for said real estate;

(2) That prior to the filing of the petition in this cause the defendants and the plaintiff, through the War Department, had executed an option contract for the purchase by the United States of America from the defendants the said real estate for the sum of $70,000.00, being the amount of compensation fixed in said option contract;

(3) The United States Supreme Court in the case of Muschany vs. United States, 89 L. Ed. Adv. Op. 492 (1945)

has held an option contract to be valid and binding, which [fol. 28] option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation;

(4) That the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands described in plaintiff's petition for the purposes therein defined and against the defendants named in this cause, and against each and all of them, jointly and severally, as their rights may appear, and that the defendants, and each and all of them, jointly and severally are entitled to compensation in solido in the sum of $70,000.00, without interest, being the full amount of the compensation mentioned in said option contract;

(5) That R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, under the terms and conditions of the said option contract, have, or may have, some right, title or interest in and to the said sum of $70,000.00 mentioned in said option contract.

Wherefore, plaintiff moves the Court to enter judgment in this cause for the condemnation of the said real estate, fixing the compensation to be paid by plaintiff to the defendants in the sum of $70,000.00, and directing plaintiff to pay into the Registry of the Court the deficiency of $48,500.00 and to make an order citing all persons and corporations, including the said R. Newton McDowell and The Kansas City Title Insurance Company, a Corporation, claiming an interest in the said fund to appear in this Court and to set up and file their claims therefor.

HARRY C. BLANTON,
United States Attorney.

.....
Special Assistant United States Attorney.

Dated this 6th day of April, 1945.

Endorsed Filed: April 6, 1945. Jas. J. O'Connor, Clerk.

[fol. 29] Answer of Defendants Lola Castlio Oliver, A. Ray Oliver, and B. Irene Castlio to Plaintiff's Motion for Judgment in Condemnation and Fixing Compensation by Option and Without Interest, and Motion by Said Defendants for Judgment.

(Filed May 2, 1945)

Come now the defendants Lola Castlio Oliver, A. Ray Oliver, and B. Irene Castlio in response to the motion heretofore filed in this cause praying the Court to give judgment for plaintiff in condemnation and to fix defendants' compensation in the amount of the option contract therein referred to but without interest on said amount, and for answer to said motion, these defendants say:

(1) Defendants admit that, as alleged in paragraph (1) of said motion, the suit was filed, and that the declaration of taking was filed, and that the sum of $21,500.00 was deposited in the registry of this Court as the estimated just compensation for the value of the real estate described in the petition filed in this cause; and, in this connection, defendants allege that all of said things were done on the 6th day of June, 1941.

(2) These defendants admit that the contract referred to as the option contract was duly made and entered into as alleged in paragraph (2) of said motion.

(3) These defendants admit the statements contained in paragraph (3) of said motion.

[fol. 30] (4) These defendants admit that the plaintiff, by virtue of this proceeding, is entitled to a judgment in condemnation against the lands of these defendants described in the petition for condemnation long since filed herein, and they admit that the sum of $70,000.00 is the amount that was agreed upon in said option contract as the value of said property as of the date of taking thereof, as alleged in paragraph (4) of said motion; but they deny that the plaintiff has any right to avoid payment of interest on said amount, and these defendants allege that they are entitled to a judgment in their favor for the sum of $70,000.00, with interest at six per cent per annum on said

amount from the date of the taking of the lands described in said petition, which was on or about December 28, 1940, to the making of the deposit herein referred to on the 6th day of June, 1941, and interest at six per cent per annum on the sum of $48,500.00 (being the difference between said sum of $70,000.00 and the amount paid into this Court at the time of the filing of the declaration of taking, to wit, the sum of $21,500.00), from the said 6th day of June, 1941, until the same is paid, and these defendants pray that judgment be entered accordingly.

(5) These defendants allege that no person other than these defendants and George A. Schneider, a former tenant of these defendants, owned any interest whatever in the lands above referred to prior to the filing of the aforesaid declaration of taking by plaintiff on or about the 6th day of June, 1941, nor is any person other than these defendants and said George A. Schneider entitled to any part whatsoever of the proceeds of the judgment to be entered in this case fixing the amount of compensation to be awarded for said lands; and that, therefore, these defendants pray the Court to find by its order and judgment that these defendants and said George A. Schneider are, alone, entitled to the amount of such judgment and such interest [fol. 31] as the same may bear until the same is paid, as above set out.

ROBERT V. NIEDNER,
St. Charles Missouri,
IGOE, CARROLL, KEEFE & COBURN,
ROBERTS P. ELAM,
1530 Boatmen's Bank Building,
St. Louis, Missouri,
Attorneys for Lola Castlio Oliver, A. Ray Oliver, and B. Irene Castlio.

Receipt of a copy of the above and foregoing answer and motion is hereby acknowledged this 2nd day of May, 1945.

HARRY C. BLANTON,
United States Attorney.

[fol. 32] (Record Entry of Submission of Motion of Plaintiff for Judgment in Condemnation, etc.)

May 7, 1945.

Now motion of plaintiff for judgment for plaintiff in condemnation and for defendants fixing compensation by option, and on responsive pleadings thereto, and countermotion of defendants for payment of interest are submitted to the Court.

[fol. 33] (Transcript of Proceedings.)

(Filed October 3, 1945.)

District Court of the United States
in and for the
Eastern Division of the Eastern Judicial
District of Missouri

United States of America, Plaintiff, v. Certain Lands in St. Charles County, Missouri, Known as the Weldon Spring Area, Defendants.	Causes Numbered: 763 764 766 767 771 772 774 777 778 779 780 781 782 783 785 786 789 790 791 792 793 794 797 798 800 803 805 806 808 811 812 813 814 818 819

Note: It is stated by Mr. Elam and substantiated by Mr. Blanton, that at the hearing of certain motions before Judge Hulen on May 7, 1945, it was orally agreed by counsel that the record made before the three-Judge Court on April 4, 1945 should be considered as the record in the cases pending in Judge Hulen's Room (Court No. 3), among which is:

United States of America,
Plaintiff,
v.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castilo Oliver and A. Ray Oliver, her husband, and B. Irene Castilo,
Defendants.
} Cause No. 960.

[fol. 34] During the March Term, A. D. 1945 of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, at a hearing held on Wednesday, April 4, 1945, at two o'clock P. M., before the Honorable District Judges, George H. Moore, Richard M. Duncan, and Rubey M. Hulen, sitting as a three-judge Court, in Court Room No. 1, at St. Louis, Missouri, in the afore-mentioned causes, the following proceedings were had:

Appearances:

For the Government, Harry C. Blanton, Esq., United States Attorney; M. Walker Cooper, Esq., Special Assistant U. S. Attorney; Russell Vandivort, Assistant U. S. Attorney; J. Ritchey Gibbons, Esq., Assistant U. S. Attorney.

For Kansas City Title Insurance Company (Interpleader), A. N. Adams, Esq., 306 Title & Trust Building, Kansas City, Missouri.

For Landowner, Addie M. Sutton, in Cause No. 790; and for Landowner, Henry Henning, in Cause No. 819; and for other landowners in various other causes, Samuel M. Watson, Esq., 4254 Olive Street, St. Louis, Missouri.

For Landowners, Lola Castilo Oliver, et al., in Cause No. 960, Roberts P. Elam, Esq., Boatmen's Bank Bldg., St. Louis, Missouri.

For Various other Landowners in various other causes,
[fol. 35] William R. Gentry, Esq., Redick O'Bryan, Esq., William H. Allen, Esq., William J. Becker, Esq., William R. Gilbert, Esq., E. D. Franey, Esq., Harry Richards, Esq., Harvey B. Cox, Esq., Francis R. Stout, Esq., Richard D. Shewmaker, Esq. (Also others present.)

For R. Newton McDowell, Blatchford Downing, Esq.

[fol. 36] Judge Moore: We have upon the respective dockets here, each of us, some of these St. Charles County cases. It is the idea, I understand, Mr. Blanton, that they are all to be submitted today.

Mr. Blanton: Yes, Your Honor. That is our understanding.

The Court: I think it might be well to find out at this time how much time each side wants for arguments and who is to participate in the arguments.

Mr. Gentry: What do you say as to the time you will want, Mr. Blanton?

Mr. Blanton: Well, I don't know. I haven't estimated. I do not want to impose on the patience of the Court. I have not estimated how much time I may want. I want to make an extended argument, however.

Judge Moore: What do you mean by an extended argument?

Mr. Blanton: I would say an hour and a half.

Judge Moore: You will make the only argument for the Government?

Mr. Blanton: Yes, Your Honor.

Judge Moore: Who is going to make the arguments for the landowners?

Mr. Gentry: A number of attorneys had a conference in my office, Your Honor, and since Mr. Watson and I had [fol. 37] handled two cases in the Supreme Court of the

United States, they suggested and requested that we should present the matter in behalf of the various attorneys.

Judge Moore: You and Mr. Watson will be the only ones?

Mr. Gentry: I cannot say we will be the only ones.

Judge Moore: Any besides Mr. Watson and Mr. Gentry?

Mr. Gentry: One or two were not present in the conference, and I am not sure if they will be agreeable, too, all of them, or not.

Judge Moore: What is your idea of time, Mr. Gentry?

Mr. Gentry: Well, so far as my own part of the time is concerned, I think, if Your Honor please, if I have thirty minutes, that will be sufficient for me. I don't know how Mr. Watson feels about it.

Mr. Watson: I feel the same way, Your Honor.

Mr. O'Bryan: I might like the Court to give me five minutes when Blanton gets through—just five minutes.

Mr. Gentry: You mean five minutes the first time, or closing argument?

Mr. O'Bryan: No. Of all time.

Judge Moore: Judge Allen?

Mr. Allen: I should like not to exceed five minutes, Your Honor; perhaps shorter.

Mr. Becker: If the Court please, I should like to have five minutes, too.

[fol. 38] Mr. Gilbert: Your Honor, we may not want to add anything, but if there is anything we want to add, we would like the privilege.

Mr. Elam: Your Honor, we feel the same as Mr. Gilbert does. The probabilities are we will not want any time, but I should like five minutes.

Judge Moore: That will be agreeable. Be an hour and a half on a side; and landowners may divide that up—Mr. Watson, Mr. Gentry.

Mr. Gentry: In the meantime, before we start, if Your Honor please, there is one more of these cases in which I have just today been served with this motion. It is in Court Room No. 3, and I would like Judge Hulen's consent for me to file that same sort of answer to the motion and motion for judgment with interest as I have filed in other cases. I would like to have that.

Judge Hulen: Let it be filed.

Mr. Franey: If the Court please, in Cause No. 782, I would like to ask leave of Court, from Judge Duncan—this is from Court No. 2—to file motions of the defendant, Louis L. Nicolai, for judgments, asking for interest—similar motion as has been filed.

Judge Moore: Let it be filed.

Judge Duncan: Do you want the same order, Mr. Blanton?

[fol. 39] Mr. Blanton: Yes, Your Honor; I would like the same order. That likewise goes to the one in Judge Hulen's Court. I apprehend that perhaps Mr. Gentry's motion is not up for today, however. We have been filing these motions constantly and some of them are not returnable until next motion day.

Mr. Gentry: Well, this one you have served on me, I have answered, now. There are some others I have not.

Mr. Blanton: Some of them are not returnable. Thirty-five of them are returnable today.

Judge Hulen: Now, can the one in which Mr. Gentry just filed answer be presented?

Mr. Blanton: So far as we are concerned, it can.

Judge Hulen: Very well.

Mr. Blanton: Your Honor, before proceeding with the argument, I think that in order that the record may be clear we ought to make a few offerings.

And thereupon the plaintiff, to sustain the issues in its behalf, offered the following evidence:

Mr. Blanton: I would like to offer first a sample or a specimen form of this option contract, which is the matter in controversy, because the Court will be called upon to pass upon the construction of that contract. I will ask that that be marked Exhibit A.

[fol. 40] U. S. Exhibit A.

Option to Purchase Land 3156

Know All Men By These Presents: That the undersigned Lola Castlio Oliver and Mrs. B. I. Castlio (her mother) for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell and convey to the Government for the consideration of Seventy Thousand Dollars ($70,000.00) that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

(Description omitted pursuant to stipulation as to record on appeal)

The Government agrees to assume the easement held by the Ajax Pipe Line Company for a pipeline right of way across a portion of this land. The Government agrees to assume the easement held jointly by Charles W. Quint and Louis Quint, his wife: William Wackler and Halie Wackler, his wife; Arthur W. Schaefer and Lena Schaefer, his wife: and Henry H. Seib and Hilda Seib, his wife, for a road one rod wide across a portion of this land.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be dis-

bursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at St. Charles, Missouri, this 24th day of December, 1940.

LOLA CASTLIO OLIVER,
MRS. B. I. CASTLIO,
A. RAY OLIVER.

Witness:

M. WILSON,
LT. A. RAY OLIVER, JR.,
M. WILSON.

Accepted by and on behalf of the United States of America this 28th day of December, 1940.

C. J. HARROLD,
Major, Q. M. C.,
United States Army.

[fol. 41] Mr. Blanton: Then I would like to offer that, which is a portion of that contract, which is the contract that was entered into between the War Department and Mr. McDowell, which incorporated this Exhibit A; which I will ask be marked Exhibit B.

(The said document was marked by the reporter as U. S. Exhibit B.)

[fol. 42] U. S. Exhibit B.

W 766 QM
6099

Wednesday
October 23rd
1940

United States of America

Attention: Col. R. D. Valliant, Q. M. C.
Chief Real Estate Branch
Office Quartermaster General
War Department
Washington, D. C.

Dear Sir:

R. Newton McDowell, hereinafter in this letter called the "Optioner", makes the following proposal, which, when accepted by the United States of America, hereinafter called the "Government", shall constitute a binding agreement:

1. R. N. McDowell will undertake with diligence and promptness to use his best efforts in the acquisition by the Government of approximately 18,000 acres of land, more or less, located in St. Charles County, Missouri, in the vicinity of Weldon Springs as more specifically to be designated by the Government.

2. The Optioner, immediately upon acceptance of this proposal will with adequate and competent force of experienced men exhaust every reasonable effort to acquire within forty-five days of the effective date of this agreement, options for the purchase of said land to be taken in the name of the United States of America. At the expiration of such forty-five day period, the Government shall have the right, upon written notice, to require the Optioner to continue his efforts for a further period to obtain options; but at no time shall the termination of the Optioner's efforts to obtain options release him from performing all duties hereafter imposed upon him in connection with options then taken, and then or thereafter accepted.

3. The Optioner shall diligently endeavor to acquire such options, not only within such time, but at the reasonable value of the land to be acquired, and subject at all time to the directions of the Government. The form of option contracted to be executed, and all terms, covenants and conditions thereof, shall be on the form approved by the Government, and a copy of which is to be attached hereto and made a part hereof. It is understood that the Government is to have the exclusive right to take up or reject any option to any parcel of land optioned by said Optioner hereunder, except as hereinafter provided.

[fol. 43] 4. The Optioner will at his expense procure the services of the Kansas City Title and Insurance Company to attend to all administrative details of the closing of purchases under the options and the acquirement of deeds. The Optioner shall procure from the vendors in all cases where options are accepted on behalf of the United States, an order to the Kansas City Title and Insurance Company, to prepare certificates of title and deeds and it shall be his responsibility to see that said certificates of title and deeds are transmitted to the proper Government official for examination. The certificates of title, to be furnished by The Kansas City Title and Insurance Company will be on forms similar to the one attached hereto and made a part hereof and funds to effect closing of purchases by the Title Company will be furnished by the Government to the Title Company in form of checks payable to each vendor in the amount of the purchase price set forth in the accepted options.

5. Duly authorized agents of the Government shall have the right at any and all reasonable times and hours to inspect and take copies of all records and memoranda of the Optioner, his agents and attorneys evidencing his transactions herein contemplated.

6. This agreement shall not be assigned by the Optioner, in whole or in part, nor shall he part with

any interest herein, it being expressly understood and agreed that the expansion of personnel, or the payment of expenses, for the purposes herein contemplated shall in no event be construed a violation of this provision.

7. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

8. For all services hereunder the compensation of the Optioner shall consist solely of the five percent (5%) commission in each purchase, to be paid by the vendor, as more specifically set forth in the form of option attached hereto and made a part hereof.

If the foregoing proposal is acceptable to the Government, please so indicate by signing and returning to me one of the enclosed carbon copies hereof.

Very truly yours,

R. NEWTON McDOWELL.

The Foregoing proposal is hereby accepted for and on behalf of the United States of America, this 23rd day of October, 1940.

R. D. VALLIANT,
Colonel, Q. M. C.,
U. S. Army.

[fol. 44] Mr. Blanton: Then I would like to offer the minutes, and files, and pleadings that have heretofore been filed in these thirty-five cases, so that the entire picture may be before the Court.

(Minutes, files, and pleadings in the 35 cases offered in evidence.)

Mr. Blanton: Now, so far as I am concerned, those are the only offers we care to make prior to proceeding with the argument.

Judge Moore: Mr. Watson?

Mr. Watson: If the Court please, in all of my cases, I would like to adopt a certain portion of the record in the Calloway case; and by way of an explanation of that, I will say that at the time of the trial of the Calloway case it was understood by all of the attorneys and by the Court that any attorney in any subsequent Weldon Spring case might adopt the whole record in the Calloway case, or so much thereof as he chose. Now, with that in mind, I would like to adopt that portion of the record appearing on page 96 of the printed transcript of the record as it was pre-
[fol. 45] pared for the Court of Appeals, consisting of a question propounded to Colonel Dutton, the then acting officer for the Weldon Spring Ordnance Plant, and the answer:

> "Q. When did you arrive on the scene of the Weldon Spring Ordnance Plant?
> A. November 13, 1940."

In addition to that, I would like to adopt, on page 102 of the printed transcript of the record, the following admission by Mr. Blanton:

> "Mr. Blanton: If it will save time, I will admit the Government took possession of the land out there along about the time Colonel Dutton arrived. We think the valuation ought to be fixed as of that date."

That is all of the record that I care to adopt.

Mr. Blanton: Now, to that offer the Government desires to object, for three reasons:

In the first place, it is our view that the date that they took possession out there is immaterial, because we think that the amount of compensation that the owners are entitled to receive is fixed—definitely and certainly fixed by the option amount, which would include also anything that might be allowed to owners for use of the land while the Government was occupying it.

In the second place, we think that does not govern, [fol. 46] irrespective of whether they seek to recover under Section 258a of Title 40 or the Declaration of Taking statute—that that statute determines interest shall run from the date the declaration is filed, which would be some months after, as shown by the files heretofore offered in evidence.

In the third place, we think that the files here would show that as to Calloway there may have been given possession at one time, but that situation would not govern the time that the other owners gave up possession, and we object to the use of that testimony in any of these other two cases, if the purport is to show when owners surrendered possession, because we think some of them held possession clear up to the following summer.

Judge Moore: What date is that asking for?

Mr. Gentry: November 13th.

Mr. Watson: November 13th, Your Honor.

Judge Hulen: All motions the same in that respect?

Mr. Gentry: No, they are not, Your Honor.

Mr. Blanton: No, they are not.

Mr. Gentry: In mine, I have fixed December 3d, and I was informed that was the day the Government started to build the fence around the tract, and I fixed December 3d, which corresponds in one of my cases with the day on which that money in our option was accepted, and that was the 3d of December, and in all of mine I have set it [fol. 47] December 3d, and I was going to ask Mr. Blanton if he agreed on December 3d in all my cases.

Mr. Blanton: No, I cannot, because I don't think that is true. That may be when they started fencing, but they were not even requested to move until January.

Mr. Gentry: Ours, I think, gave immediate possession.

Mr. Blanton: If you did, you did that voluntarily.

Judge Moore: It will be received, subject to the objection.

Mr. Adams: Your Honor, I represent the Kansas City Title and Insurance Company, and we filed a claim in response to the notice in each one of these cases and, of course, we are ready to take them up, but I understand you want these taken up in the order of distribution.

Mr. Blanton: We understand that matter is not now before the Court.

Mr. Adams: Well, it is satisfactory to me to pass it until the order of distribution, but we were here in response to the Court's order—Court's formal notice.

Mr. Blanton: I also understand counsel representing Mr. McDowell is here, prepared to enter his appearance at the appropriate time, claiming the commission that is due him under his contract.

[fol. 48] Mr. Gentry: Well, we think that would have to go over, too.

Judge Moore: Those matters are not to be taken up today.

Mr. Gilbert: Your Honor, in case No. 814, Division 2, we actually delivered possession to the government at their request sometime in November, but their contract was not accepted by the Government officials until December 3d, and, being familiar with this record, I spoke to Judge Cooper when he served me with the motion, asking him if there would be any dispute about that date—that if there was, I wanted to bring somebody down to prove it, and he said he did not think there would be any dispute about that date. Now, if there is, I would like to go ahead with my proof.

Mr. Blanton: Yes, there is, because we don't think that possession was obtained at that time.

Mr. Gilbert: Well, we will ask leave then to put on proof—go ahead with the arguments on some of the law—and put on proof that there was, because we have already alleged in our motion that that is the date.

Judge Moore: All right.

Mr. Elam: In case No. 767, the situation is the same as that in Mr. Gilbert's case to which he has just [fol. 49] referred, and I also ask leave to adduce proof on the same.

Judge Moore: Very well.

Mr. Gentry: It seems to me, if Your Honor please, in all of these cases, since there are now 35 of them, there are different dates when possession was obtained, that we would have to have some proof in each and every case, which does not appear to be necessary now.

Judge Moore: Not today.

Mr. Gentry: Today—because you are after the general principle today as to what is to be done as to interest.

Mr. Becker: As to case No. 786, I make the same request, Your Honor.

Judge Moore: Very well.

Mr. Cox: Same situation in case No. 808, if Your Honor please.

Mr. Gentry: I want to correct one erroneous statement Mr. Blanton evidently made inadvertently in which he said the statute, referring to 258a, fixed the time in this way—the date of the taking, but he said the date of filing the declaration of taking; but that statute says that the judgment shall include interest on the amount finally awarded as the value of the property as of the date of taking; it does not say date of filing the notice of taking. Those are two different things, but I will elaborate on that in argument.

[fol. 50] Mr. Watson: If the Court please, I would like to say that I don't desire it understood that by incorporating this evidence in the record I am relying solely on that record as to the date of taking the possession, and I would like leave to introduce evidence at the proper time.

Judge Moore: That is our thought, that if it is ever determined that you are entitled to interest, then you will

be given an opportunity to make a showing as to what date.

Mr. Gentry: In each case.

Judge Moore: In each case.

Mr. O'Bryan: If the Court please, excuse me for not rising.

Judge Moore: That is all right. Keep your seat.

Mr. O'Bryan: Each one of these contracts is dated. The contract with the Government is dated. If they want to argue about these little things, they can all agree upon the date of that contract, because that is right in this Court in each case.

Judge Moore: That will be determined in each case, after we determine the general principle.

You may proceed, Mr. Blanton.

Which was all the evidence offered at the hearing.

(Here followed arguments.)

[fol. 51] Certificate of Court Reporter.

I, Floyd A. Buchanan, do hereby certify that I was present in the court room at this hearing on May 7, 1945, at St. Louis, Missouri, that I recorded the proceedings truly and accurately in shorthand, and that the foregoing is a true and accurate transcript of my shorthand notes of such proceedings up to the time that the arguments were commenced.

FLOYD A. BUCHANAN,
Court Reporter.

[fol. 52] Findings and Judgment.

(Filed May 14, 1945.)

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al.,
Defendants.

Docket No. 960.
At Law.

Now on this day, this Court having heretofore heard a motion filed by the plaintiff for judgment for plaintiff in condemnation and fixing the amount to be paid the defendants at the price agreed to by option contract referred to and set up in the answer filed by the defendants herein, and evidence having been offered in support of said motion, and arguments of counsel having been made and said motion taken under advisement, and the Court being now fully informed in the premises, doth Find, Adjudge, and Decree:

That the United States of America is plaintiff and the following named parties are defendants in this action:

Lola Castlio Oliver, if living or if dead, then The Unknown Consort, Heirs, and Devisees of the said Lola Castlio Oliver

Mrs. B. I. Castlio, also known as B. Irene Castlio, if living or if dead then The Unknown Consort, Heirs and Devisees of the said Mrs. B. I. Castlio, also known as B. Irene Castlio

A. Ray Oliver, if living or if dead, then The Unknown Consort Heirs and Devisees of the said A. Ray Oliver

Collector of Revenue of St. Charles County, Missouri

County of St. Charles, State of Missouri

Darst Bottoms Drainage and Protective District No. 2

J. M. Sydnor

George A. Schneider

St. Charles County, Missouri, Mortgagee

All Other Unknown Owners of all that tract of land in St. Charles County, Missouri, Known as Tract No. 254, and more particularly described herein;

[fol. 53] That prior to the filing of the petition herein and prior to any proceedings in connection therewith, including the filing of a declaration of taking in this cause, the defendants Lola Castlio Oliver, Mrs. B. I. Castlio and A. Ray Oliver and the plaintiff, through the War Department of the United States, entered into and executed an option contract, and said option contract was accepted by the plaintiff in accordance with the terms thereof, whereby and as a result of which action, the plaintiff agreed to purchase and said last named defendants agreed to sell to the plaintiff the real estate herein described, for an agreed compensation and sum of Seventy Thousand Dollars ($70,000.00);

That said last named defendants were at the time of executing said option contract and filing said declaration of taking the owners ~~in fee~~ simple of the land herein described;

That the Supreme Court of the United States has held binding on the parties thereto, an option contract for the sale of lands, the provisions of which and the circumstances surrounding the execution of which are the same as the option contract executed by the parties in this case, except as to the names of the landowners, the description of the property, and the sale price;

That under the terms and provisions of the option contract executed by the plaintiff and the last named defendants in this case the sum of Seventy Thousand Dollars

($70,000.00) is the purchase price agreed upon therein as the total compensation to which the last named defendants as landowners are entitled for said tract of land herein described, and that under said option contract, said last named defendants as landowners are not entitled to any further or additional compensation for said tract of land;

[fol. 54] That under the terms and provisions of said option contract the plaintiff, the United States of America, in the event that title is not accepted by the plaintiff, is entitled to perfect title by condemnation proceedings, and in the event of the perfecting of title to said tract of land by condemnation proceedings, the sale price set forth in the option contract for the tract of land herein described and described in said option contract, is to be the award and the total sum received by the defendants last named as landowners, as the agreed compensation for the taking of said land, without interest or any further, other, or additional compensation;

That prior to the decision of the Supreme Court of the United States holding said option contract valid and binding, the plaintiff herein caused to be filed herein a Declaration of Taking of said land by Henry L. Stimson, Secretary of War of the United States; that the filing of said Declaration of Taking and the vesting of title to the real estate herein described in the plaintiff by virtue thereof are not inconsistent or contrary to the terms of said option contract, executed by the plaintiff and last named defendants, as landowners herein, in order to perfect the title to said land in the plaintiff, providing the defendant landowners are paid and receive the agreed compensation as set out in said option contract for the real estate;

That upon the filing of said Declaration of Taking, the fee simple title to said tract of land therein described and herein described became vested in the United States of America, the plaintiff herein, and the title and possession of said tract of land was then and has ever since been in [fol. 55] the plaintiff, United States of America, and neither of the defendants has since had any right, title or interest in same;

That at the time of the filing of the said Declaration of Taking by Henry L. Stimson, Secretary of War of the United States, there was deposited in the registry of this Court the sum of Twenty-one Thousand Five Hundred Dollars ($21,500.00), as the then estimated just compensation for the appropriation of the fee simple title of said tract of land in said declaration described and herein described, subject to all existing highway and public utility easements, but including the fee underlying said existing easements, but said deposit was erroneous in failing to equal the agreed compensation set out in said option contract;

That on the 18th day of May, 1944, an Order of Partial Distribution was entered herein whereby the sum of $6,500.00 was disbursed leaving a balance of $15,000.00 in the Registry of the Court, subject to the further orders of this Court;

[fol. 56] That of the agreed compensation set forth in said option contract to be paid by plaintiff and received by the last named defendants as landowners for said tract of land, there remains to be deposited in the registry of this Court the sum of Forty-eight Thousand Five Hundred Dollars ($48,500.00);

That this proceeding in condemnation was instituted by the plaintiff as in such cases made and provided by the laws of the United States, including the issuance of process, writs, and notices, and that the defendants have been duly served with process as required by law, or have duly entered their appearance herein;

That plaintiff's petition and proceedings set forth a cause of action for the purpose of acquiring, by proceedings in condemnation, the fee simple title to the land described herein, which lands are necessary to provide for the establishment of an ordnance plant for the national defense of the United States of America and for other military use incidental thereto in connection with the Weldon Spring Ordnance Plant; and the awarding to the plaintiff in said condemnation proceedings of a judgment in condemnation will perfect title to the real estate herein described finally and completely in the plaintiff, and on payment to the defendant last named as landowners, of the

agreed compensation, will be in conformity with the terms of said option contract executed by plaintiff and the last named defendants;

That this Court has jurisdiction of the subject matter of this case, and all parties named as defendants;

That the land described in plaintiff's petition, known as Tract No. 254, is the land described in the Declaration of Taking referred to herein, and is bounded, defined, and described as follows:

(Description of property omitted pursuant to stipulation as to record on appeal.)

[fol. 57] And, that Plaintiff's said motion is sustained;

Now, Therefore, in accordance with the above findings of fact, it is Ordered, Adjudged, and Decreed:

That the plaintiff, United States of America, by virtue of this proceeding, is awarded judgment in condemnation against the premises described in Plaintiff's petition and above described, for the purposes herein defined and specified, and against the defendants herein and each and all of them, jointly and severally, as their title and rights may appear, and that the title in fee simple, subject to all existing highway and public utility easements, but including the fee underlying such existing easements, is vested in the Plaintiff, the United States of America, and has been vested in the Plaintiff, United States of America, upon and since the filing of the Declaration of Taking, and that the defendants and each and all of them, jointly and severally, are divested of any and all right, title, interest, and claim, of every nature and description in the lands above described;

That in accordance with the option contract executed by the plaintiff, United States of America, and the defendant landowners, and accepted by the United States of America, the defendant landowners are entitled to and there is awarded to them the sum of Seventy Thousand Dollars ($70,000.00), the agreed compensation set forth in said option contract; said sum under the terms and provisions of said option contract being without interest, and said

sum being the full amount to which defendant landowners are entitled in this cause, and any and all other persons who may be found entitled thereto as claiming by, through, or under them;

That the plaintiff shall pay into the registry of the Court forthwith the sum of Forty-eight Thousand Five Hundred Dollars ($48,500.00), in accordance with the terms of said option contract, said amount being the difference between [fol. 58] the agreed compensation price fixed in said option contract, and the amount heretofore deposited by the Plaintiff at the time of the filing of the Declaration of Taking, which amounts shall repose in the registry of this Court for disposition, use and benefit of the defendant landowners and other defendants claiming an interest therein, by and through said defendant landowners, in the way and manner and in proportion as this Court shall hereafter order, adjudge and decree;

That this cause shall be held open for entry of such further orders and judgments as may be just in the premises.

RUBEY M. HULEN,
Judge.

Dated this 14th day of May, 1945.

[fol. 59] (Docket Entry of Tender of certain Money into Court by Plaintiff.)

May 17, 1945.

Plaintiff tenders into court to the use and benefit of persons entitled thereto, deficiency in the sum of $48,500.00, which sum is deposited by the Clerk in the Registry.

[fol. 60] Order of Court Re Claims to Compensation and Distribution Thereof.

(Filed May 18, 1945.)

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al.,
Defendants.

Docket No. 960.
At Law.

It appearing to the Court upon suggestion of the Plaintiff, by its Attorneys, that there may be a conflict of claims to an interest in the compensation adjudged in this cause as damages; that all parties having an actual or potential interest in the premises have been duly served with process or notified as defendants herein and that the Court has jurisdiction over each and every defendant;

Now, Therefore, upon oral motion and request of said Attorneys,

It Is Ordered that all parties-defendant and other persons having or claiming any interest in or to the award of damages fixed by the judgment in this cause as to said Tract No. 254, be and the same are hereby required and ordered to file intervening petitions setting up their respective claims, if any, which they desire to present to all or any part of said award of damages, with the Clerk of this Court by the 6th day of June, 1945, or otherwise such claims may be disregarded and disallowed;

And It Is Further Ordered that said intervening petitions will be heard, time permitting, by this Court at St. Louis, Missouri, on the 13th day of June, 1945, but if not

reached on that day will be continued to such time as the Court may then and there fix;

And It Is Further Ordered that the plaintiff or its attorneys give notice, stating the title of this case as above set out and where pending and citing this Order herein, requiring and ordering intervening petitions to be filed herein by all parties-defendant or other persons having or claiming to have any interest in or to the said award of damages herein and the time and place set for hearing said intervening petitions, to all said defendants whose places of residence are known, by mailing to each of said defendants a copy of said notice and to all "not found" and "unknown" defendants and other persons by posting a copy thereof in the office of the Clerk of this Court at least ten (10) days before the 6th day of June, 1945.

RUBEY M. HULEN,
United States District Judge.

Dated this 18th day of May, 1945.

[fol. 61] Motion of Defendants Lola Castlio Oliver, Mrs. B. I. Castlio (Also Known as B. Irene Castlio) and A. Ray Oliver for a New Trial.

(Filed May 23, 1945.)

Come now the defendants Lola Castlio Oliver, Mrs. B. I. Castlio (also known as B. Irene Castlio) and A. Ray Oliver and move the Court to set aside and vacate the findings and judgment entered herein on the 14th day of May, 1945, and to grant these defendants a new trial herein, for the reasons following, to wit:

(1) The Court erred in sustaining plaintiff's motion to enter judgment for the "option contract" price of the land condemned herein without any interest, as the total just compensation for the land so condemned.

(2) The Court erred in overruling the motion of these defendants for judgment for said "option contract" price, together with interest as prayed for in

said motion, as the total just compensation for such land.

(3) The Court erred in entering judgment for the "option contract" price of the land so condemned, without any interest, as the total just compensation for such land.

(4) The Court erred in failing and refusing to enter judgment for said "option contract" price, together with interest as prayed for in these defendants' [fol. 62] said motion, as the total just compensation for such land.

(5) The Court erred in excluding from its judgment herein the interest which was due and to become due on the "option contract" price, and in entering judgment without including any interest, as a part of the total just compensation for the land herein condemned.

ROBERT V. NIEDNER,
IGOE, CARROLL, KEEFE & COBURN,
ROBERTS P. ELAM,
Attorneys for Defendants Lola Castlio Oliver, Mrs. B. I. Castlio (also known as B. Irene Castlio) and A. Ray Oliver.

Receipt of a copy of the above and foregoing motion is hereby acknowledged this ..... day of May, 1945.

.....
United States Attorney.

[fol. 63] (Record Entry of Submission and Overruling of Motion of Defendants for New Trial.)

June 4, 1945.

Now come the parties by their respective attorneys, whereupon motion of defendants for a new trial is submitted to the Court and such motion is, by the Court, after due consideration thereof, overruled.

[fol. 64] Amended Petition of Defendants Mrs. B. I. Castlio, Also Known as B. Irene Castlio, Lola Castlio Oliver and A. Ray Oliver for Distribution of Amount on Deposit in the Registry of the Court in This Cause.

(Filed June 13, 1945.)

Come now Mrs. B. I. Castlio, also known as B. Irene Castlio, Lola Castlio Oliver and A. Ray Oliver, defendants in the above entitled cause, in response to a notice by the attorney for plaintiff to all interested persons to file petitions for distribution of the amount on deposit in the registry of the Court in this cause, and respectfully state and show to the Court that:

(1) These defendants were, prior to the filing of the petition and the declaration of taking filed in this cause, the owners of the entire fee simple title to all of the lands described in plaintiff's petition, and are entitled to all of the compensation for said lands, with the exception and in the proportions referred to hereinafter.

(2) The defendant Mrs. B. I. Castlio, also known as B. Irene Castlio, was, prior to the filing of the petition and declaration of taking filed herein, the owner of a life estate in said lands.

(3) The defendants Lola Castlio Oliver and A. Ray Oliver were, prior to the filing of the petition and declara-
[fol. 65] tion of taking filed herein, the owners of the fee simple remainder in said lands, subject to the aforesaid life estate in the defendant Mrs. B. I. Castlio, also known as B. Irene Castlio.

(4) The defendant George A. Schneider was, prior to the filing of the petition and declaration of taking filed herein, a tenant upon said lands, and had, prior to the filing of said petition and declaration of taking, entered into an agreement with these defendants whereby he would accept $650.00 of the proceeds from said lands as and for his full compensation for his interest as such tenant.

(5) One George Jungermann was, prior to the filing of the petition and declaration of taking filed herein, a tenant

upon said lands, and had, prior to the filing of said petition and declaration of taking, entered into an agreement with these defendants whereby he would accept $430.00 of the proceeds from said lands as and for his full compensation for his interest as such tenant.

(6) No other person, firm, corporation or municipality, county, state or government, has any lawful claim to or against the fund constituting the compensation to be paid by plaintiff for said lands.

(7) The defendant Mrs. B. I. Castlio, also known as B. Irene Castlio, was born November 2, 1862, and the value of her aforesaid life estate in the amounts heretofore deposited in the registry of this Court in this cause, commuted under the provisions of Section 3522, Revised Statutes of Missouri, 1939, is $16,968.00, which said commuted value is subject to charges as follows:

Value of tenancy of defendant George A. Schneider	$ 650.00
Value of tenancy of George Jungermann.	430.00
[fol. 66] Brought forward	1,080.00
Taxes paid Collector of St. Charles County	194.00
Assessments paid Darst Bottoms Drainage and Protective District No. 2	110.62
	$1,384.62,

leaving a balance due defendant Mrs. B. I. Castlio, also known as B. Irene Castlio Oliver, of $15,583.38, to which she is entitled out of the amount on deposit in the registry of this Court in this cause.

(8) The defendants Lola Castlio Oliver and A. Ray Oliver, through the defendant Lola Castlio Oliver, have heretofore withdrawn $6,500.00 of the amounts heretofore deposited in the registry of this Court in this cause, and are entitled to $47,036.62 of the amount on deposit in the registry of this Court in this cause.

(9) The defendant George A. Schneider has heretofore received, out of the amount heretofore withdrawn by the

defendants Lola Castlio Oliver and A. Ray Oliver from the registry of this Court in this cause, the sum of $200.00, and is entitled to $450.00 of the amount on deposit in the registry of this Court in this cause.

(10) Said George Jungermann is entitled to $430.00 of the amount on deposit in the registry of this Court in this cause.

Wherefore, these defendants respectfully pray the Court to make and enter an order in this cause distributing the amount on deposit in the registry of this Court in this cause ($63,500.00) as follows:

[fol. 67]

Name of Distributee	Amount
Mrs. B. I. Castlio, also known as B. Irene Castlio	$15,583.38
Lola Castlio Oliver and A. Ray Oliver	47,036.62
George A. Schneider	450.00
George Jungermann	430.00
	$63,500.00

and these defendants further pray that the order of this Court ordering said distribution be made without prejudice to the defendants, or to the plaintiff, with regard to any claim or claims of the parties respecting interest upon the "option contract" price for said lands, or as a part of the full just compensation for said lands.

ROBERT V. NIEDNER,
IGOE, CARROLL, KEEFE & COBURN,
ROBERTS P. ELAM,
Attorneys for Defendants Mrs. B. I. Castlio, also known as B. Irene Castlio, Lola Castlio Oliver and A. Ray Oliver.

Receipt of a copy of the above and foregoing petition is hereby acknowledged this 13th day of June, 1945.

HARRY C. BLANTON,
United States Attorney.

[fol. 68] Order of Final Distribution.

(Filed August 6, 1945.)

In the United States District Court
Eastern District of Missouri
Eastern Division.

United States of America,
Plaintiff,
vs.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al.,
Defendants.
Docket No. 960
At Law.

On the 13th day of June, 1945, came the parties herein and this cause came on to be heard on the motion of plaintiff, United States of America, for an Order of Distribution among the defendants or the persons entitled thereto, of the money now in the Registry of the Court in the sum of $63,500.00, being the sum of $15,000.00 remaining after the distribution of $6,500.00 of the $21,500.00 deposited with the Declaration of Taking filed in this case on June 6, 1941, and $48,500.00, the amount of the deficiency, deposited by plaintiff, pursuant to the option contract and the Findings and Judgment entered May 14, 1945; and the cause was on that day submitted for order of distribution and taken under advisement by the Court.

It appears to the Court that the petitioner, United States of America, gave notice under Order made in this cause, requiring all claimants to said award to file intervening [fol. 69] petitions by June 6, 1945, and that said intervening petitions would be heard on June 13, 1945; that said petitioner caused notice to be given to all defendants of known address by mailing to each of them a notice as required by said Order and by posting a copy of the notice as required by said Order in the office of the Clerk of this Court at St. Louis, Missouri; said notice was so mailed and posted more than ten days before the 6th day

of June, 1945; and the Court having seen and heard said motion and the evidence adduced thereon by the parties herein as well as the arguments of counsel finds that the defendants and other persons have interests therein as hereinafter set forth and doth find affecting the premises as follows:

The Court finds that the petitioner, United States of America, has paid into the Registry of the Court the sum of $70,000.00, the compensation fixed by the option contract and the judgment of this Court entered on May 14, 1945;

The Court further finds that at the time of the filing of the Declaration of Taking in this case B. Irene Castlio, Lola Castlio Oliver and A. Ray Oliver were the owners of the land being condemned in this case.

The Court further finds that under the terms and provisions of the option contract mentioned in the Findings and Judgment entered herein on May 14, 1945, R. Newton McDowell has filed a claim for the sum of $3,500.00, and that Kansas City Title Insurance Company has filed a claim for $1,050.00;

[fol. 70] The Court further finds that the Plaintiff, the United States of America, for and in behalf of the Collector of Internal Revenue of the Sixth Collection District of Missouri has filed an intervening claim and a supplemental intervening claim against the said R. Newton McDowell by which it claims by virtue of certain tax liens mentioned therein to be entitled to the said sum of $3,500.00 due to the said R. Newton McDowell under the terms of the said option contract;

The Court further finds that it was stipulated and agreed by and between the parties herein that the total amount of the commissions claimed by the said R. Newton McDowell in his intervening claims filed in the several cases now pending in this Court (Court Number 3) are not sufficient in amount to pay the total amounts mentioned and claimed in the intervening claims and the supplemental intervening claims of the plaintiff, the United States of America for and in behalf of the Collector of Internal Revenue for the Sixth Collection District of Missouri,

based on tax assessments filed in the said several cases pending in this Court (Court Number 3);

The Court further finds that the intervening claim and the supplemental intervening claim of the United States of America for the Collector of Internal Revenue for the Sixth Collection District of Missouri having come on for hearing and thereupon R. Newton McDowell, having heretofore filed his intervening claim to a portion of the funds paid into the Registry of the Court in this condemnation proceeding, files and presents a "Motion of R. Newton Mc-
[fol. 71] Dowell with respect to tax claims of the United States of America", praying the Court to determine the nature of the issues, if any, as between the United States and said Collector on the one hand and himself on the other, and if the same be held to be adversary as between him and the United States and the Collector, to dismiss the same for want of jurisdiction of the subject matter, and if not so adversary then that an order herein for the delivery of funds to said United States or the Collector be without prejudice to the rights of said McDowell or any party claiming under him to demand refund of all or any part thereof and to bring suit against the Collector or the United States for recovery of all or any portion of said taxes, interest or penalties believed by him to have been improperly or invalidly assessed and;

The Court having examined the said intervening claims and heard statements and arguments of counsel for the said parties respectively, determines and decrees that this proceeding is not adversary as between the United States and said Collector on the one hand and said McDowell on the other, and the merits or validity of the tax assessments are not involved herein, but only the right of the Collector to take into his possession by virtue of his tax liens and assessments whatever funds are awarded or allowed to McDowell by virtue of the latter's intervening claims herein, and that the order entered herein on said claims
[fol. 72] of the United States and said Collector is and shall be without prejudice to the right of said McDowell or parties claiming under, by or through him, to demand refund of, and seek or sue for recovery of, any amount of said taxes, interest and penalties believed by him to have been improperly or invalidly assessed.

The Court finds that taxes in favor of the United States were assessed against R. Newton McDowell in the amounts and the assessment lists received by the Collector of Internal Revenue for the Sixth Collection District of Missouri on the dates, all as alleged in the claim and supplemental claim of the United States and said Collector filed herein and said assessments constitute a lien on the funds in the Registry of the Court herein awarded and adjudged to R. Newton McDowell;

The Court thereupon finds and determines that R. Newton McDowell is entitled to five per cent of the deposits made in this case and said sums amount to $3,500.00 which sum is ordered paid and disbursed to said Collector of Revenue for the Sixth Collection District of Missouri;

[fol. 73] The Court further finds that the claim of the Kansas City Title Insurance Company in the sum of $1,050.00 should be paid out of the said money deposited in the Registry of the Court in this cause;

The Court finds that by agreement George A. Schneider, a tenant on the lands condemned in this case prior to the filing of the Declaration of Taking, is entitled to $650.00 of the compensation for said lands and that he has heretofore been paid in order of partial distribution entered in this case on May 18, 1944 the sum of $200.00 leaving a balance of $450.00 now due to the said George A. Schneider;

The Court further finds that George Jungermann, a tenant on the lands condemned in this case prior to the filing of the Declaration of Taking, is entitled to $430.00 of the compensation for said lands;

The Court further finds that B. Irene Castlio was the owner of a life estate in the tract of land condemned in this case and that the value of her life estate commuted under provisions of Section 3522, revised statutes of Missouri, 1939, is $15,865.08;

The Court further finds that the value of the life estate of the said B. Irene Castlio is subject to certain charges as follows: the value of the tenancy of the defendant George A. Schneider, $650.00; the value of the tenancy of

George Jungermann, $430.00; taxes paid to the Collector of St. Charles County, at the time of the parties distribution heretofore made in this case on May 18, 1944, $194.00; and assessments due the Darst Bottoms Drainage and Protective District No. 2, paid at the time of the partial distribution entered in this cause on May 18, 1944 in the sum of $110.62;

[fol. 74] The Court further finds the total amount of the said charges against the commuted value of the life estate of the said B. Irene Castlio is $1,384.62 and that after such total charges are deducted from the commuted value of the life estate of B. Irene Castlio in the sum of $15,865.08 the net value of the life estate of the said B. Irene Castlio is $14,480.46;

The Court further finds that Joseph M. Sydnor filed a claim for $250.00 as the reasonable market value of logs, cord wood, posts and other merchantable timber that had been severed from, but was still lying upon, the lands condemned in this case at the time of the filing of the Declaration of Taking in this cause and that said claim should be disallowed;

It Is Therefore Ordered that James J. O'Connor, Clerk of the United States District Court for the Eastern District of Missouri, Eastern Division, shall disburse at this time out of the funds in the Registry of this Court in this cause, the sum of $58,950.00 in the manner following:

To: George A. Schneider, tenant, the sum of.$ 450.00
(Mail check to Roberts P. Elam, c/o Igoe, Carroll, Keefe & Coburn, Attorneys, 1530 Boatmen's Bank Bldg., St. Louis 2, Missouri)

To: George Jungermann, tenant, the sum of.$ 430.00
(Mail check to Walker Wooldridge, Attorney, Wentzville, Missouri)

To: B. Irene Castlio, life estate, the sum of..$14,480.46
(Mail check to Roberts P. Elam, c/o Igoe, Carroll, Keefe & Coburn, Attorneys, 1530 Boatmen's Bank Building, St. Louis 2, Missouri)

To: Lola Castlio Oliver and A. Ray Oliver, her husband, the sum of $43,589.54

(Mail check to Roberts P. Elam, c/o Igoe, Carroll, Keefe & Coburn, Attorneys, 1530 Boatmen's Bank Building, St. Louis 2, Missouri)

It Is Further Ordered that James J. O'Connor, Clerk of the United States District Court for the Eastern District of [fol. 75] Missouri, Eastern Division, shall disburse on or after three months after this date the sum of $4,550.00, the balance of the funds on deposit in the Registry of this Court in the manner following:

To: Kansas City Title Insurance Company, the sum of ..... $ 1,050.00

(Mail check to Cobbs, Logan, Roos and Armstrong, Attorneys, 506 Olive St., St. Louis 1, Missouri)

To: United States of America, for and in behalf of the Collector of the Sixth Collection District of Missouri, the sum of ..... $ 3,500.00

(Mail check to Dan M. Nee, Collector of Revenue, Kansas City 6, Missouri)

The Court further finds that upon disbursement under the terms of this Order, full and final payment will have been made for each and every interest in and to the property involved in this cause.

RUBEY M. HULEN,
United States District Judge.

Dated this 2 day of August, 1945.

[fol. 76] Motion of Defendants Lola Castlio Oliver and A. Ray Oliver, Her Husband, and B. Irene Castlio for a New Trial Upon, or in the Alternative to Modify, Order of Final Distribution.

(Filed August 14, 1945.)

Come now the defendants Lola Castlio Oliver and A. Ray Oliver, her husband, and B. Irene Castlio, and move the Court to set aside and vacate the order of distribution entered herein on the 6th day of August, 1945, and to grant these defendants a new trial thereon, or in the alternative to modify said order of final distribution, for the reasons following:

(1) The Court erred in finding in said order of final distribution that:

> "The Court further finds that it was stipulated and agreed by and between the parties herein that the total amount of the commissions claimed by the said R. Newton McDowell in his intervening claims filed in the several cases now pending in this Court (Court Number 3) are not sufficient in amount to pay the total amounts mentioned and claimed in the intervening claims and the supplemental intervening claims of the plaintiff, the United States of America for and in behalf of the Collector of Internal Revenue for the Sixth Collection District of Missouri, based on tax assessments filed in the said several cases pending in this Court (Court Number 3);"

for the reason that these defendants did not make or enter, and there is no evidence in the record in this cause showing or tending to show that these defendants made or entered, into such a stipulation or agreement as found by the Court.

[fol. 77] (2) The Court erred in finding and determining that R. Newton McDowell is entitled to five per cent of the deposits made in this case, which percentage amounts to $3,500.00, and in ordering said sum disbursed to the Collector of Revenue for the Sixth Collection District of Missouri or to the United States of America for and in

behalf of the Collector of the Sixth Collection District of Missouri.

(3) The Court erred in finding that the claim of the Kansas City Title Insurance Company in the sum of $1,050.00 should be paid out of the money deposited in the registry of this Court in this cause, and in ordering said sum of $1,050.00 paid out of the registry of this Court in this cause to the said Kansas City Title Insurance Company.

(4) The Court erred in failing and refusing to distribute the $63,500.00 remaining on deposit in this Court in accordance with the amended petition of these defendants for distribution as follows:

Name of Distributee	Amount
Mrs. B. I. Castlio, also known as B. Irene Castlio	$15,583.38
Lola Castlio Oliver and A. Ray Oliver	47,036.62
George A. Schneider	450.00
George Jungermann	430.00
	$63,500.00

and in failing and refusing to make such distribution without prejudice to the defendants, or to the plaintiff, with regard to any claim or claims of the parties respecting interest upon the "option contract" price for the lands condemned in this cause, or as a part of the full just compensation for said lands.

(5) The Court erred in its finding as follows:

> "The Court further finds that upon disbursement under the terms of this Order, full and final payment will have been made for each and every interest in and to the property involved in this cause."

[fol. 78] in that said finding is immaterial to said order of final distribution, and purports and tends to prevent these defendants from prosecuting an appeal upon their claim to interest as a part of the full just compensation to which they are entitled for the property condemned in this cause.

(6) The Court erred in its finding in said order of final distribution as follows:

> "The Court further finds that upon disbursement under the terms of this Order, full and final payment will have been made for each and every interest in and to the property involved in this cause."

in that said finding is contrary to the law and the facts of this case under the law.

(7) The Court erred in failing and refusing to make its order of final distribution without prejudice to these defendants, or to the plaintiff, with regard to any claim or claims of the parties respecting interest upon the "option contract" price for the lands condemned in this cause, or as a part of the full just compensation for said lands.

ROBERT V. NIEDNER,
IGOE, CARROLL, KEEFE & COBURN,
ROBERTS P. ELAM,
Attorneys for Defendants B. Irene Castlio and Lola Castlio Oliver and A. Ray Oliver, Her Husband.

I hereby certify that I served the above and foregoing motion for a new trial on the 14th day of August, 1945, by mailing a copy thereof to each of the following: Cobbs, Logan, Roos & Armstrong, Attorneys for Kansas City Title Insurance Company, 506 Olive Street, St. Louis, Missouri; Harry C. Blanton, United States Attorney, United States Courthouse & Custom House, 12th & Market Streets, St. Louis, Missouri; and Blatchford Downing, Attorney for R. Newton McDowell, 2000 Fidelity Building, Kansas City, Missouri.

ROBERTS P. ELAM.

[fol. 79] (Docket Entry relating to Cost Bond on Appeal.)

August 22, 1945.

Cost bond of defendants Lola Castlio Oliver, et al on appeal, filed. Defendants deposit the sum of $250.00 in cash in lieu of other surety.

[fol. 80] (Order extending time to file Transcript on Appeal.)

(Filed September 14, 1945.)

Upon oral application therefor, it is hereby

Ordered, that defendants, Lola Castlio Oliver and A. Ray Oliver, her husband, and B. Irene Castlio, [illegible] hereby are granted an extension of time to and including November 12, 1945 within which to file the record on appeal and docket this cause in the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 14 day of September, 1945.

R. M. DUNCAN,
Judge.

[fol. 81] (Memorandum and Order on overruling of Motion of Defendants for New Trial, or, in the Alternative to modify Order of Final Distribution.)

(Filed September 27, 1945.)

This case is now before the Court on the landowners' motion for a new trial upon, or in the alternative, to modify, order of final distribution.

On May 14, 1945, this Court made and entered a judgment awarding Seventy Thousand Dollars ($70,000.00) as the agreed compensation for the land acquired by the plaintiff by virtue of a certain option contract referred to in the pleadings in this case. Over the protest of defendant landowners, no interest was allowed on the compen-

sation agreed to in the option contract. The plaintiff was ordered to pay into the registry of the Court Forty-eight Thousand Five Hundred Dollars ($48,500.00), being the difference between the amount previously paid into the Registry of the Court by the plaintiff in this case and the agreed option price for the land in suit, of Seventy Thousand Dollars ($70,000.00). On August 6, 1945, after notice and hearing on respective claims filed for the fund on deposit in the registry of the Court, an order was entered of final distribution of the fund in the registry of the Court to the respective claimants and the landowners, as the Court then found their interest in the fund, and it is this order that is now attacked by the motion under consideration. The order of August 6, 1945, concludes as [fol. 82] follows: "The Court further finds that upon disbursement under the terms of this order, full and final payment will have been made for each and every interest in and to the property involved in this cause."

At the time the order of final distribution was made, no appeal had been taken from the judgment of May 14, 1945. The landowners have since initiated proceedings to appeal from the judgment and order of final distribution, as they have a right to do, and, of course, should it be subsequently determined that additional compensation is due the landowners or that this Court's findings on any of the claims were erroneous, this Court will be bound to follow such ruling. The fact that the landowners may take down from the registry of the Court funds found to be due them, in the order of August 6, 1945, should and will not prejudice them in any manner to attack by appropriate proceedings the orders or judgments in this case and to receive hereafter any additional compensation which might be found to be due them.

In other cases of a kindred nature (763, 766, 769, 779, 783, 786, 789, 790, 796, 803, 806, 819, 826, 830, 839, 843, 856, 859, 860, 863, 866, 869, 873, 876, 879, 979, 986, 999, 1003, 1006, and 1019) we have made orders similar to the orders and judgments in this case. We believe it was well understood by all parties, plaintiffs, landowners, and lien claimants, that the withdrawal of funds on deposit in

the registry of the Court, found to be due the landowners would not prejudice their right to receive any further sums that might thereafter be adjudged to be due them. If not, this memorandum should leave no doubt on the subject.

Order.

Defendants' Motion for a New Trial, or, in the Alternative, to Modify Order of Final Distribution, is over-ruled.

RUBEY M. HULEN,
Judge.

[fol. 83] Statement of Points.

(Filed October 10, 1945.)

In the United States District Court
Eastern District of Missouri
Eastern Division,

United States of America,
Plaintiff,

v.

Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, et al.,
Defendants.

Docket No. 960
At Law.

The points upon which defendants-appellants intend to rely in this appeal are as follows:

(1) The Court erred in sustaining plaintiff's motion to enter judgment for the "option contract" price of the lands condemned herein, without any interest, as the total just compensation for the lands so condemned.

(2) The Court erred in overruling the motion of these defendants-appellants for judgment for said "option contract" price, together with interest at six per centum on said amount from the date of the taking of the lands con-

demned in this cause, which was on or about December 28, 1940, to the making of the deposit of $21,500.00 into the registry of the Court on the 6th day of June, 1941, and interest at six per centum per annum on the sum of $48,500.00 (being the difference between the said "option contract" price of $70,000.00 and the amount paid into Court at the time of the filing of the Declaration of Taking, to wit, the sum of $21,500.00), from the said 6th day of June, 1941, until the 17th day of May, 1945, as the total just compensation for said lands.

(3) The Court erred in entering judgment for the [fol. 84] "option contract" price of the lands so condemned, without any interest, as the total just compensation for such lands.

(4) The Court erred in failing and refusing to enter judgment for said "option contract" price, together with interest at six per centum on said amount from the date of the taking of the lands condemned in this cause, which was on or about December 28, 1940, to the making of the deposit of $21,500.00 into the registry of the court on the 6th day of June, 1941, and interest at six per centum per annum on the sum of $48,500.00 (being the difference between the said "option contract" price of $70,000.00 and the amount paid into Court at the time of the filing of the Declaration of Taking, to wit, the sum of $21,500), from the said 6th day of June, 1941, until the 17th day of May, 1945, as the total just compensation for said lands.

(5) The Court erred in excluding from its judgment herein the interest which was due and to become due on the "option contract" price, and in entering judgment without including any interest, as a part of the total just compensation for the lands herein condemned.

ROBERT V. NIEDNER,
IGOE, CARROLL, KEEFE & COBURN,
ROBERTS P. ELAM,
Attorneys for Defendants-Appellants Lola Castlio Oliver, A. Ray Oliver, and B. I. Castlio (also known as B. Irene Castlio).

Receipt of a copy of the above and foregoing Statement of Points is hereby acknowledged, and it is stipulated and agreed that the same shall become a part of the record on appeal herein, this 9th day of October, 1945.

HARRY C. BLANTON,
United States Attorney,
Attorney for Plaintiff.

[fol. 85] (Stipulation as to Contents of Transcript on Appeal.)

(Filed October 3, 1945.)

It is hereby stipulated by and between the parties hereto that the record on appeal herein shall consist of the following items:

(1) Motion for leave to file petition and for order of summons, filed June 6, 1941.

(2) Order entered on said motion for leave to file petition, etc.

(3) Petition in condemnation filed June 6, 1941 (omitting therefrom the description of the lands sought to be condemned).

(4) Declaration of Taking filed June 6, 1941 (omitting therefrom that part of Schedule A, thereto attached, relating to Tract No. A, and omitting therefrom the attached plats).

(5) Order and judgment entered upon the Declaration of Taking on June 6, 1941 (omitting therefrom the description of the lands taken).

(6) Answer of defendants Lola Castlio Oliver, A. Ray Oliver, and Mrs. B. I. Castlio, filed December 23, 1941.

(7) Motion of plaintiff for judgment for plaintiff in condemnation, and for defendants fixing compensation, [fol. 86] filed April 6, 1945.

(8) Answer of defendants Lola C. Oliver, A. Ray Oliver and B. Irene Castlio to plaintiff's motion for judgment in

condemnation and fixing compensation by option and without interest, and motion by said defendants for judgment, filed May 2, 1945.

(9) Minute entry of submission of plaintiff's motion for judgment for plaintiff in condemnation and for defendants fixing compensation, and answer of defendants Lola C. Oliver, et al., thereto, entered May 7, 1945.

(10) Transcript of evidence adduced at hearing on April 4, 1945 (which evidence, by agreement, was that upon which the motions were submitted May 7, 1945).

(11) Findings and judgment entered May 14, 1945.

(12) Minute entry of payment into court, of $48,500.00 to the use and benefit of persons entitled thereto as compensation for the lands condemned, entered May 17, 1945.

(13) Order filed and entered on May 18, 1945 directing all persons having or claiming any interest in or to the award of damages fixed by judgment in this cause to file intervening petitions setting up their respective claims by June 6, 1945, and setting said petitions for hearing on June 13, 1945.

(14) Motion of defendants Lola Castlio Oliver, A. Ray Oliver and B. Irene Castlio for a new trial, filed May 23, 1945.

(15) Order overruling said motion of defendants for a new trial, entered June 4, 1945.

(16) Amended intervening petition of defendants Mrs. B. I. Castlio, etc. et al., for distribution of amount on deposit in registry, filed June 13, 1945.

(17) Order of final distribution filed and entered August 6, 1945.

(18) Notice of appeal filed August 14, 1945.

(19) Motion of defendants Lola Castlio Oliver, A. Ray [fol. 87] Oliver, and B. Irene Castlio for a new trial upon, or in the alternative to modify, order of final distribution, filed August 14, 1945.

(20) Minute entry of filing of bond for cost on appeal, entered August 22, 1945.

(21) Order granting defendants Lola C. Oliver, A. Ray Oliver, and Mrs. B. Irene Castlio an extension of time to and including November 12, 1945, within which to file transcript of record on their appeal herein in the United States Circuit Court of Appeals, filed and entered September 14, 1945.

(22) Memorandum and order of the Court overruling defendants' motion for a new trial upon, or in the alternative to modify, order of final distribution, filed and entered on September 27, 1945.

(23) This stipulation.

Dated St. Louis, Missouri, this 3rd day of October, 1945.

HARRY C. BLANTON,
United States Attorney,
Attorney for Plaintiff.

IGOE, CARROLL, KEEFE & COBURN,
ROBERT V. NIEDNER,
ROBERTS P. ELAM,
Attorneys for Defendants Lola Castlio Oliver, A. Ray Oliver, and B. Irene Castlio.

[fol. 88] (Clerk's Certificate to Transcript.)

United States of America,
Eastern Division of the
Eastern Judicial District
of Missouri. } ss.

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except in so far as the same is restricted by the stipulation of the designation of the record on appeal heretofore set out) of the record and proceedings in case No. 960 entitled United States of America, Plaintiff vs. Certain Land situate in St. Charles County, State of Missouri, Known as Tract No. 254, and Lola Castlio Oliver, Mrs. B. I. Castlio, A. Ray Oliver; Collector of Revenue of St. Charles County, Missouri; County of St. Charles, State of Missouri; wherein Lola Castlio Oliver, A. Ray Oliver, her husband, and B. Irene Castlio, are defendants-appellants and the United States of America is appellee, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said court at office in the City of St. Louis, in said Division of said District this 10th day of October, in the year of our Lord, Nineteen Hundred and Forty-five.

JAMES J. O'CONNOR,
Clerk, U. S. District Court.

(Seal)

By JOHN J. JARVIS,
Deputy Clerk.

Filed Oct 13 1945. E. E. Koch, Clerk.

[fol. 76] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Roberts P. Elam and Mr. Richmond C. Coburn as Counsel for Appellants.)

United States Circuit Court of Appeals

Eighth Circuit

Lola Castlio Oliver, et al., Appellants,
No. 13,174. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellants.

ROBERTS P. ELAM
RICHMOND C. COBURN

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 13, 1945.

(Appearance of Mr. Robert V. Niedner as Counsel for Appellants.)

The Clerk will enter my appearance as Counsel for the Appellants.

ROBERT V. NIEDNER,
County Court House,
St. Charles, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 30, 1945.

[fol. 77] (Appearance of Mr. Harry C. Blanton, Mr. M. Walker Cooper and Mr. J. Edward Williams as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

HARRY C. BLANTON,
U. S. Attorney.

M. WALKER COOPER,
Special Asst. U. S. Attorney.

J. EDWARD WILLIAMS,
Acting Head, Lands Division,
Department of Justice, Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 17, 1945.

(Appearance of Mr. S. Russell Vandivort as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

S. RUSSELL VANDIVORT,
Asst. U. S. Attorney.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 30, 1945.

[fol. 78] (Order of Submission.)

January Term, 1946.

Thursday, January 10, 1946.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Richmond C. Coburn for appellants, continued by Mr. Harry C. Blanton, United States Attorney, for appellee, and concluded by Mr. Richmond C. Coburn for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 79] (Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 13,174.

Lola Castlio Oliver and A. Ray Oliver, her Husband, and Mrs. B. I. Castlio, (also known as B. Irene Castlio), Appellants, vs. United States of America, Appellee.	Appeal from the District Court of the United States for the Eastern District of Missouri.

[April 9, 1946.]

Mr. Richmond C. Coburn (Messrs. Igoe, Carroll, Keefe & Coburn and Mr. Robert V. Niedner were with him on the brief) for Appellants.

Mr. Harry C. Blanton, United States Attorney (Mr. J. Edward Williams, Acting Head, Lands Division; Mr. M. Walker Cooper, Special Assistant to the United States Attorney; Mr. S. Russell Vandivort, Assistant United States Attorney; and Mr. Roger P. Marquis and Miss Wilma C. Martin, Attorneys, Department of Justice, were with him on the brief), for Appellee.

Before SANBORN, THOMAS, and RIDDICK, Circuit Judges.

RIDDICK, Circuit Judge, delivered the opinion of the Court.

This is one of the numerous controversies growing out of the acquisition by the United States of a large tract of land near Weldon Springs in St. Charles County, Missouri, to be used as a location for a Government ordnance plant. The efforts of the War Department to purchase the land in the area selected for the ordnance plant, its acceptance of approximately 270 contracts from owners to convey their tracts to the United States for stipulated sums, and its unsuccessful attempt to repudiate all of the contracts of purchase which had not been fully executed on the conclusion that the contracts violated the statutory prohibition of a cost-plus-a-percentage-of-cost system of contracting in section 1 of the National Defense Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A., Appendix, § 1171, are detailed in the opinion of the District Court for the Eastern District of Missouri in *United States* v. *Certain Land Situate in St. Charles County, Missouri*, 46 F.Supp.

921; and in the opinions of this court in *United States* v. *Muschany*, 139 F.2d 661, and of the Supreme Court in *Muschany* v. *United States*, 324 U.S. 49.

This case involves one of the purchase contracts. Since the decision of the Supreme Court in *Muschany* v. *United States, supra*, the validity of contract is established. The sole question on this appeal is whether the owners of the land are entitled to recover interest in addition to the price stipulated in the purchase contract in a proceeding instituted by the United States, following its attempted repudiation of the contract, to acquire the land by condemnation. The contract was executed by the appellant landowners on the 24th day of December, 1940, and accepted on behalf of the United States by the authorized agent of the War Department on the following 28th day of December. The contract is entitled "Option to Purchase Land." It recites that for the consideration of $1.00 paid by the United States the owners agree to sell and convey to the United States for a consideration of $70,000 the land, together with the right of immediate occupancy and use of the land for any purpose whatsoever from and after acceptance by the United States of the purchase contract until such land is conveyed to the United States by the owners and title approved by the Attorney General of the United States and the agreed purchase price paid by the United States to the owners. The landowners agree to furnish the Government a good and merchantable title to the land, free of all liens and encumbrances, and further that the Government may acquire the land by condemnation in the event the title offered by the landowners is not approved by the Attorney General. The paragraph with reference to condemnation is as follows:

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which

said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

After taking possession under the contract and following the conclusion that the purchase contract was void, the United States on June 6, 1941, instituted proceedings for condemnation of the land. On that date the United States filed its declaration of taking and deposited in the registry of the court $21,500 as estimated just compensation. On the same day an order was entered vesting title in the United States. The landowners filed an answer, setting up the purchase contract, insisting upon its validity, and requesting the court to fix the award for the land at the sum stipulated in the contract with interest at six per cent per annum from the date of the acceptance of the contract by the Government. Perhaps because the parties were awaiting final decision in the Muschany case as to the validity of the purchase contract there brought in question, which was identical with the contract involved in the present case so far as material to the question here, nothing more was done until after the decision of the Supreme Court in that case came down on February 5, 1945. On April 6, 1945, the United States filed a motion in the condemnation proceedings, reciting that the validity of the purchase contract had been sustained by the Supreme Court in the Muschany case, and asking an order of the District Court directing the United States to pay into the registry of the court the difference between the sum of $21,500 theretofore deposited as estimated compensation and the price stipulated in the purchase contract and for judgment in condemnation in accordance with the contract. To this motion the land-

owners filed a response, consenting to judgment in condemnation in favor of the United States for the price stipulated in the purchase contract, plus interest thereon from the date of acceptance of the contract by the Government until the deposit of the estimated compensation made with the declaration of taking in the condemnation proceedings on June 6, 1941, and with interest at six per cent thereafter on the difference ($48,500) between the amount deposited with the declaration of taking and the price stipulated in the purchase contract. On May 14, 1945, the trial court entered a judgment sustaining the motion of the United States and denying interest. The landowners appeal.

The right of an owner to just compensation for his land taken by the United States is guaranteed by the Constitution. Just compensation is the fair value of the land paid contemporaneously with its taking. Where the taking precedes the payment of fair value, the owner is deprived of the use of the land or of the use of its equivalent in money for the time between the taking and payment. In such cases, in order that the owner shall not suffer loss and shall receive the just compensation guaranteed him by the Constitution, he is entitled to interest upon the fair value of the land from the date of the taking until payment. *United States* v. *Rogers*, 255 U.S. 163, 169; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 305-306. This constitutional right of the owner whose property is taken is recognized in the Act under which the condemnation in this case proceeded. The statutory provision is that just compensation "shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded

as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court." 40 U.S.C.A., § 258a.

Contracts between the Government and a landowner made in contemplation of acquisition of land by condemnation, fixing the value of the land for that purpose, are valid. *Danforth* v. *United States*, 308 U.S. 271, 282; *Bank of Edenton* v. *United States*, 4 Cir., 152 F.2d 251, 254. Plainly, where after such a contract the United States acquires possession of the land in the contemplated condemnation proceedings and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of taking until payment in order that the constitutional requirement of just compensation may be satisfied. Conversely, where the payment of the agreed value and the taking in the condemnation proceedings are contemporaneous, interest is not allowable. Nothing more is held in the Danforth case. It must also be true that where, as in the present case, the agency of the Government acquiring the land for the United States is authorized to acquire it by purchase, contracts made by it on behalf of the United States with the landowners may validly fix the net amount to be received by the landowner from the United States for the taking of the land either by purchase or by condemnation. In such a contract the parties may bind themselves to a consideration which may be either greater or less than just compensation in the constitutional sense. That this was the effect of the contract in question here we have no doubt. By it, the United States acquired the possession and the use of the land until title vested in it by the payment of the stipulated purchase price. See *Muschany* v. *United States*, *supra*, p. 62.

In the present case the United States having repudiated its purchase contract, the landowners could have accepted this repudiation and in the condemnation proceedings recovered, as a part of just compensation, interest at the statutory rate upon the amount awarded them in excess of the amount paid into the registry of the court at the time of the declaration of taking. They were, however, within their rights in insisting upon the validity of the purchase contract and upon its controlling effect upon the question of the compensation to be received by them, as they did throughout these proceedings. Having taken this position, their right to recover interest upon the sum stipulated in the purchase contract depends upon the interpretation of that contract which, of course, must be considered in its entirety. The landowners are not entitled to insist upon provisions of the contract favorable to them while rejecting others which are unfavorable.

There is no provision in the contract for the payment of interest on the stipulated consideration, nor does the contract fix a time within which payment is required. Delay in the payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied. The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States. The purchase price stipulated in the contract may be fairly regarded, at the very least, as the agreed equivalent of just compensation for the taking of the land by condemnation or by purchase. By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceed-

ings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract. They may not complain that the resulting award to them was, in the words of the contract on which they rely, "in accordance with all the terms and provisions of this option."

The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, can not justify the award of interest not required by the contract. In the absence of a statute or an express contract providing for it, interest can not be added to an obligation of the United States. *United States* v. *North Carolina*, 136 U.S. 211; *United States* v. *Rogers*, *supra*, p. 169; *Seaboard Air Line Ry. Co.* v. *United States*, *supra*, p. 304. The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation. "* * * interest does not run upon claims against the Government even though there has been a default in the payment of the principal." *Smyth* v. *United States*, 302 U.S. 329, 353.

We have not overlooked the decision in *United States* v. *Baugh*, 5 Cir., 149 F.2d 190. We think that case may be distinguished from this on the ground that the contract there involved was interpreted by the court as fixing only the fair value of the land for the purpose of a condemnation then proceeding. If, however, this distinction is not warranted, we are unable to follow the decision in the Baugh case.

The judgment of the District Court is affirmed.

[fol. 87] (Judgment.)

United States Circuit Court of Appeals

Eighth Circuit

March Term, 1946.

Tuesday, April 9, 1946.

Lola Castlio Oliver and A. Ray Oliver, her husband, and Mrs. B. I. Castlio (also known as B. Irene Castlio),
Appellants,
No. 13,174. vs.
United States of America.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 9, 1946.

IN THE

United States Circuit Court of Appeals

FOR THE EIGHTH CIRCUIT.

LOLA CASTLIO OLIVER and A. RAY OLIVER, Her Husband, and MRS. B. I. CASTLIO (Also Known as B. IRENE CASTLIO), Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 13,174. Civil.

Appeal from the District Court of the United States for the Eastern District of Missouri.

APPELLANTS' MOTION FOR REHEARING.

Now come the appellants, within fifteen days after the date of the judgment entered by this Court on the 9th day of April, 1946, and move the Court to set aside its opinion, decision and judgment and to order a rehearing of the issues involved in this appeal, for the reason that the said opinion of the Court inadvertently overlooked certain material matters of law and fact involved in this cause, in the following particulars, to wit:

I.

The Court, in its opinion, treats the case as if it were one for the specific performance of a contract and inadvertently overlooks the fact that this is a condemnation

suit in which the Government obtained the title to the land in question under the provisions of 40 U. S. C. A., Section 258a, under the express terms of which it is bound to pay interest.

The unexpressed premise of the Court's opinion seems to be that this is a suit on a contract for specific performance, and since the Government cannot be held to pay interest in a suit on a contract unless the contract specifically calls for the payment of interest, therefore no interest is allowable. In so doing, the Court overlooks the fact that this is not a suit against the Government for the specific performance of any contract. The District Court would have no jurisdiction of such a suit under 28 U. S. C. A., Section 41 (20), where the Tucker Act limits the jurisdiction of the Federal District Courts in suits on contracts against the Government to controversies involving not more than $10,000. To repeat, this is not a suit for specific performance of a contract. If this Court believes it is, then it is forced to the conclusion that neither the District Court nor this Court has any jurisdiction of the cause.

This Court mentions the existence of 40 U. S. C A., Section 258a, only once in its opinion, on page 4, where it comments that the statute recognizes the constitutional rights of the landowner. The truth of the matter is that the Government in this cause obtained all of its rights to the land in question solely under the provisions of this statute. The option contract did not purport to pass title. The Government repudiated the option contract and did not receive title under any deed. It obtained title by its Declaration of Taking and the order and judgment on the Declaration of Taking, which stated "that the title to said land in fee simple absolute, vested in the United States of America upon the filing of said Declaration of Taking."

Since the Government did not obtain title under the option contract, and did obtain title only by virtue of the

Declaration of Taking filed under 40 U. S. C. A., Section 258a, the Government's rights and duties in obtaining title are measured by that statute with one exception: The Supreme Court of the United States, in **Muschany v. United States**, 324 U. S. 49, 65 S. Ct. 442, held that in the condemnation suit the Government is bound by the contract insofar as the contract price establishes the fair value of the land. The Supreme Court did not hold that the relationship between the Government and the landowners rested solely on contract because, if so, the Government would not now have title to the land. That title it obtained only by virtue of the statute.

Having obtained the benefit of the statute, the Government is bound by the terms of the statute to the payment of interest. Phrased differently, the effect of **Muschany v. United States**, supra, is to ingraft upon the rights and duties of the parties under the statute, the provisions of the contract so far as it sets the fair value of the land.

Considerable space in the opinion is taken up with an interpretation and construction of the contract, but in so doing no mention is made of the effect of the provisions of the statute which provide for interest. Really, the only room for interpretation of the contract is to start with the premise that since the Government obtained its rights under the statute which provides for interest, the contract must be examined solely with a view to determine whether or not the landowners expressly waived their rights to interest under the statute. That approach to the interpretation of the contract is overlooked by the Court.

If the Court starts with the central fact in this suit that the rights of the Government in this condemnation suit spring solely from the statute, it cannot treat the matter as if it were specifically enforcing the contract against the Government and as if 40 U. S. C. A., Section 258a, were not pertinent. This is either a suit in con-

demnation in which the Government is bound by the statute under which it acted, unless the parties have expressly waived the provisions of the statute by contract, or it is an action for specific performance of a contract, in which case the United States District Court had no jurisdiction of the case at all.

II.

As we understand the opinion of the Court, its holding is fairly summarized as follows: The landowner is constitutionally guaranteed just compensation for his land, which is the fair value of the land when payment is contemporaneous with taking, but where payment is subsequent to taking, includes interest from the date of taking until payment. When the Government and the landowner enter into a contract in contemplation of condemnation, the contract must fall into one of two classes: (a) contracts between the Government and a landowner, made in contemplation of acquisition of land by condemnation "fixing the value of the land for that purpose," fall within the constitutional requirement for the payment of interest; or (b) contracts which "fix the net amount to be received by the landowner from the United States for the taking of the land either by purchase or by condemnation," as to which no interest need be paid. To determine whether interest is payable, the contract in question must be interpreted "in its entirety" and placed in either category (a) or category (b). The determining factors in classifying a contract are said to be:

(1) If there is no provision for interest, the contract falls under classification (b);

(2) If the contract does not fix a definite time within which payment is required or contemplates delay in payment, the contract falls in category (b).

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So far as this Court holds that a contract which covers only the fair value of the land is subject to the constitutional and statutory requirements for the payment of interest, but a contract in which the purchase price by agreement covers both the fair value of the land and the use of the land by the Government until payment therefor is not subject to the payment of interest by the Government because, by construction, the equivalent of that interest was originally included by the parties in the purchase price, we are in accord. We believe, however, that the tests applied by this Court in attempting to draw a line between the two classes of contracts mentioned are faulty and will not stand analysis.

The nature of the contract cannot be determined by the absence of a provision specifically calling for the payment of interest. Interest is guaranteed both under the Constitution and by statute. Thus, if a landowner should follow this Court's opinion, pages 4 and 5, and draw up a contract in contemplation of acquisition of land by condemnation "fixing the value of the land for that purpose," this Court says that as to such a contract "interest must be allowed the owner." Thus such a contract which did not in any way, shape or form mention interest would, however, be subject to the constitutional and statutory requirement that interest be paid. Yet, on page 6 of this Court's opinion, in interpreting the contract in this case, it relies upon the fact that "there is no provision in the contract for the payment of interest on the stipulated consideration" in reaching the conclusion that this contract did not merely establish the fair value of the land. It is evident from the opinion, on pages 4 and 5, that a specific provision for interest is not necessary for a class (a) contract because interest follows by virtue of constitutional and statutory requirements. Yet on page 6 of the opinion the fact that there is no provision for in-

terest seems to be determinative to the Court that the contract is a class (b) contract. (Evidently this confusion springs from the Court's unexpressed premise that it is dealing with a suit for the specific performance of a contract and that in such a suit interest cannot be allowed against the Government unless the contract specifically calls for it.)

The second test used by the Court in its opinion to determine the nature of the contract (Opinion, page 6) is whether or not the contract fixes a definite time within which payment is required or contemplates delay in payment. Again the Court has inadvertently used a faulty test.

Suppose that in accordance with the opinion of this Court, on pages 4 and 5, a contract should be drawn up between the Government and a landowner which did not provide for the giving of a deed but provided solely for the acquisition by the Government of the land by condemnation and provided that in such contemplated condemnation suit the parties, by agreement, fixed "the value of the land for that purpose" and that the agreed value of the land should be deposited by the Government with its petition in condemnation. Presume the circumstances at the time to be as they were in 1940, that the Government desired immediate possession by virtue of an emergency but did not have manpower or program sufficient to allow an immediate filing of the condemnation suit, so it provided for immediate possession in the contract. Sometime later the Government files the condemnation suit under 40 U. S. C. A., Section 258a, but instead of depositing the agreed amount, deposits only a small fraction thereof, and after a lapse of some four years, the Government is forced by decision of the Supreme Court to pay the agreed amount. Would the Government then have to pay interest? This Court, in its opinion (p. 5), says:

"Plainly, where after such a contract the United States acquires possession of the land in contemplated condemnation proceedings and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of taking until payment in order that the constitutional requirement of just compensation may be satisfied."

Yet, in such a case where the contract between the parties followed the exact wording of this Court's opinion, the agreement would have failed to fix an exact date on which payment was to be made and delay in the payment would be clearly implied from the contract, so that despite the test of failure to fix an exact date and contemplated delay, this Court would, under its opinion, on pages 4 and 5, be forced to allow interest. It would appear from the opinion itself that the lack of definite date and delay are not accurate tests.

Another illustration may exhibit the fallacy of this test. Suppose a contract to purchase land was entered into by the Government with the landowner. No mention is made at all of possible condemnation, but the contract merely sets out the purchase price and provides that upon the furnishing of a deed and certificate of title by the seller, the Government shall pay the agreed purchase price. It is hornbook law that the contract would not be found invalid, though no date for performance was specifically stated, since any court would find that the contract was to be performed in a reasonable time. Suppose that after the contract was entered into, but before the termination of a reasonable time, the Government repudiated the contract and condemned the land under 40 U. S. C. A., Section 258a, and the Government deposited only a small fraction of the agreed purchase price. Under **Muschany v. United States**, supra, and **Danforth v. United States**, 308

U. S. 271, 60 S. Ct. 231, the contract would be binding in condemnation as to the fair value of the land. What about interest? The Government did not take title by the contract and no deed was given. The parties did not have interest in mind at all in the contract. Obviously the contract was intended to cover the fair value of the land. The tests used by this Court, on page 6 of its opinion, would indicate that no interest would be paid; but under the holding in this opinion, on pages 4 and 5, interest would have to be allowed. Why? The parties only agreed on one thing, namely, the fair value of the land. The right to interest would follow not from the contract but from the Constitution and condemnation statute. Yet no mention would have been made of interest and there would have been no specific date for payment and delay would have been contemplated. It is submitted that the tests used by this Court, on page 6 of its opinion, are wholly erroneous and contradictory to this Court's opinion on pages 4 and 5. (Again, the reason for the contradiction in the opinion evidently springs from this Court's failure to recognize the fact that the rights of the Government as to this land originated solely in condemnation by virtue of the statute. The right to interest did not originate in contract and the rules as to allowing interest in suits on a contract against the Government are not applicable. Where the Government obtains its rights by condemnation, it must pay interest unless the contract waives the right of the landowner to interest.)

But if it is necessary that the option contract in this case fix a date by which payment should be made, the contract does fix such a date. The contract provided that upon furnishing a final certificate of title, the Government should pay the purchase price (Record, p. 37). Under elementary law the landowner would have only a reasonable time to furnish such a certificate of title. The contract also provides that if the title should not be approved by

the Attorney General, the Government should file a condemnation suit and "upon filing its petition in such proceedings deposit said agreed purchase price with the Clerk of said court." Thus, the contract itself furnishes the date of payment with reasonable certainty in the absence of condemnation and specifically furnishes the date for payment in the event of condemnation, namely, the date that the Government filed its condemnation petition.

What other tests can be applied to this contract to determine whether it falls into class (a) or class (b)? Perhaps the wording of the contract so far as it relates to the consideration is as good a test as any to determine the intent of the parties as to whether they were dealing with an amount which represented the "value of the land" or the value of the land plus the use of the land by the Government until payment. The option contract refers to the consideration on six occasions in the following terms:

(1) "To sell and convey to the Government for the consideration of * * *."

(2) "Gross sales price."

(3) "The agreed purchase price."

(4) "The agreed purchase price."

(5) "Under a consent verdict fixing the award at the agreed valuation."

(6) "Said agreed purchase price."

It may be admitted that the phrase "agreed purchase price" is not completely determinative. It is obvious from the record, however, that that phrase was used in connection with the idea that the landowner was presently agreeing to sell his land for the consideration named, with the whole deal to be consummated in the near future in a reasonable time. Certainly the phrase cannot be twisted to mean that the parties contemplated that the Govern-

ment would delay payment for a period of 4½ years and that the purchase price was intended to cover both the fair value of the land and the use of the land during that period. The truth of the matter is that when those phrases were used, the only thing the parties contemplated was an immediate sale and immediate payment of the purchase price, and that what they had in mind was the value of the land at that time, not just compensation in the sense of fair value of the land plus the use of it for 4½ years.

At the one point in the option contract where condemnation is contemplated, the contract provided that the Government could acquire the land by condemnation proceedings "under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will, upon filing its petition in said proceedings, deposit said agreed purchase price with the clerk of said Court." Here the term "consent verdict" is used, the term "award" is used, and the term "agreed valuation" is used. All of these terms are synonymous only with the idea that the consideration there referred to represented the fair value of the land plus, at most, the use by the Government of the land until it filed its petition in condemnation. The use of these terms must be construed in the light of the condemnation procedure where the verdict of the jury, after an appeal from commissioners, fixes the fair value of the land on the date of taking, and the Court, under the provisions of the statute, adds to the fair value of the land six per cent interest from the date of taking, the total sum being just compensation. This Court has inadvertently overlooked this provision of the contract in determining whether or not the parties intended to contract only for the fair value of the land or for full and just compensation including fair value and the use of the land for 4½ years while the Government failed to pay.

For this Court to say, in its opinion, that by this con-

tract the landowners intended to hand over the land to the Government and receive the purchase price from the Government at some indefinite time in the future, in this case almost 4½ years from the time the Government took possession, and that the parties intended by their contract that the purchase price covered the use by the Government of the land during all of that period and the retention by the Government of the money during that period where the contract specifically provided that payment should be made the moment the Government filed its petition in condemnation constitutes an inadvertent overlooking by the Court of the express terms of this contract. If the intent of the contracting parties is the true test rather than the ones mentioned by this Court (and having in mind that the landowner in no wise prepared this contract, and that a contract must be interpreted against the party drawing it), then it follows that the conclusion that it was the intent of the landowners in these cases to forego interest by this contract must be arrived at by some highly artificial tests having no relation to the actual state of mind of the parties as expressed in the contract.

III.

The Court has inadvertently overlooked the grounds for the decision in **United States v. Baugh**, 149 Fed. (2d) 190 (C. C. A. 5), in distinguishing that case.

In **United States v. Baugh**, supra, the Government and the landowners entered into a contract whereby the Court, in condemnation, was authorized to adjudge "just compensation for the lands taken, to be in the sum of * * *." The contract in no wise mentioned interest and did not set any specific date for payment. The Court held (1) that under the Constitution a landowner is entitled to interest on the fair value of its property, and that a stipulation in regard to compensation which does not cover interest in no wise disturbs the constitutional right of the landowner

to interest; (2) that the constitutional right to interest will not be presumed to have been waived merely by the failure to specifically provide for it in writing. It is interesting to note that the amount which the Government agreed to pay for the land was referred to as "just compensation for the lands taken", but nevertheless the Court held that the landowner was also entitled to interest on the amount fixed by the contract in order to satisfy the constitutional guaranty of just compensation.

For purposes of possible review of this Court's opinion, it is felt that it would be fair if this Court flatly stated that it refused to follow the ruling in the **Baugh** case, as it obviously does. The distinguishing of the **Baugh** case in this opinion, in view of the wording of the contract in that case, as compared with the wording of the contract in the present case, is really only a refusal to follow that decision, and such holding should be made explicit.

Respectfully submitted,

IGOE, CARROLL, KEEFE & COBURN,
RICHMOND C. COBURN,
THOMAS L. CROFT,
ROBERT V. NIEDNER,
Attorneys for Appellants.

Richmond C. Coburn, one of the attorneys for appellants, hereby certifies that the foregoing Motion for Rehearing is filed for the sole purpose of calling the Court's attention to material matters of law or fact inadvertently overlooked by the Court in its opinion, as is shown by its opinion and the foregoing Motion for Rehearing, and that said Motion is not made for the purpose of delay, but is filed in good faith and is believed to be meritorious.

RICHMOND C. COBURN,
Attorney for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 23, 1946.

[fol. 100] (Order denying Motion of Appellants for Rehearing.)

March Term, 1946.

Tuesday, April 30, 1946.

Motion for rehearing filed by appellants in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

April 30, 1946.

(Motion of Appellants to Stay Issuance of Mandate.)

Comes now the appellants in the above entitled cause, and move the Court to stay the issuance of its mandate herein for thirty days from April 30, 1946, the date of the denial herein of appellants' petition for rehearing, and thereafter until final disposition of said cause by the Supreme Court of the United States, provided that within such stay, there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the petition for certiorari, record, and brief have been filed, as provided by Rule 16 of this Court.

And in support of this motion the said appellants state that they will in good faith file in the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of April 9, 1946, affirming the judgment of the District Court, and the order and judgment of April 30, 1946, overruling and denying appellants' petition for a rehearing in this cause.

Wherefore, appellants respectfully pray that the issuance of the mandate of this Court be stayed and withheld for [fol. 101] thirty days and that if within such stay there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court that the petition for certiorari, record, and brief have been filed, such stay shall continue until final disposition by the Supreme Court.

RICHMOND C. COBURN,
IGOE, CARROLL, KEEFE & COBURN,
1530 Boatmen's Bank Building,
St. Louis 2, Missouri,
ROBERT V. NIEDNER,
St. Charles, Missouri,
Attorneys for Appellants.

Receipt of service of the above motion to stay the mandate, and a copy of said motion, is hereby acknowledged this 8th day of May, 1946.

C. J. HUGHES,
Spec. Asst. United States Attorney,
St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 8, 1946.

[fol. 102] (Order Staying Issuance of Mandate.)

May Term, 1946.

Friday, May 10, 1946.

On Consideration of the motion of the appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 10, 1946.

[fol. 103] (Motion to Substitute for Deceased Party.)

Comes now A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, appellant in the above entitled cause, and for this motion states that the said appellant, Lola Castlio Oliver, died domiciled in the County of St. Charles and State of Missouri on the 10th day of March, 1946, leaving a Last Will and Testament, and that on the 15th day of March, 1946, your movent was duly appointed and qualified as Executor of the estate of said appellant by the Probate Court of the County of St. Charles, State of Missouri.

Wherefore, your movent, as Executor of the Estate of Lola Castlio Oliver, requests this Court to permit your

movent to voluntarily substitute himself as a party to the appeal in lieu of the appellant Lola Castlio Oliver.

RICHMOND C. COBURN,
1530 Boatmen's Bank Building,
St. Louis 2, Missouri.

IGOE, CARROLL, KEEFE & COBURN,
1530 Boatmen's Bank Building,
St. Louis 2, Missouri.

ROBERT V. NIEDNER,
St. Charles, Missouri.
Attorneys for A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver.

Receipt of service of the above Motion to Substitute, and a copy of said Motion, is hereby acknowledged this 8th day of May, 1946.

[fol. 104]

C. J. HUGHES,
Spec. Asst. United States Attorney,
St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 8, 1945.

(Letters Testamentary to A. Ray Oliver, Executor of Estate of Lola Castlio Oliver, deceased.)

In The Probate Court

The State of Missouri,
County of St. Charles—ss.:

The State of Missouri, to all to whom these Presents shall come—Greeting:

Know Ye, That the Last Will and Testament of Lola Castlio Oliver deceased, late of St. Charles County, Missouri, hath, in due form of law, been exhibited, proved and recorded, in the office of the Judge of the Probate Court of

St. Charles County, Missouri, a copy of which is hereunto annexed; and inasmuch as it appears that A. Ray Oliver has been appointed Executor in and by said Last Will and Testament, to execute the same, and to the end that the property of the said Testator may be preserved for those who shall appear to have a legal right or interest therein, and that the said Last Will and Testament may be executed according to the request and instruction of the Testator, we do hereby authorize him the said A. Ray Oliver as such Executor, to collect and secure all and singular the goods and chattels, rights and credits, which were of the said Lola Castlio Oliver at the time of her death, in whosoever hands or possession the same may be found; and to perform and fulfill all such duties as may be enjoined upon him by said [fol. 105] Last Will and Testament so far as there shall be property and the law charge him; and in general to do and perform all other acts which are now or may be hereafter required of him by law.

In Testimony Whereof, I, Webster F. Karrenbrock, Judge of the Probate Court, in and for said County of St. Charles, have hereunto signed my name and affixed the seal of said Court, at office in St. Charles, Mo., this 15th day of March, A. D. 1946.

(Seal) WEBSTER F. KARRENBROCK,
Judge of Probate.

State of Missouri,
County of St. Charles:—ss.:

I, Myrtle Wolter, Clerk of the Probate Court, in and for said County, hereby certify that the foregoing is a true copy of the original Letters Testamentary granted to A. Ray Oliver on the Estate of Lola Castlio Oliver, deceased, as the same appear of record in my office. And I hereby further certify that said Letters are now in full force and have not been revoked, and the person named therein is

still the duly qualified and acting Executor of the Estate of said Lola Castlio Oliver, deceased.

Witness my hand and the seal of said Court. Done at office in St. Charles, Mo., this 15th day of May, 1946.

(Seal) MYRTLE WOLTER,
Clerk of the Probate Court of
St. Charles County, Missouri.

[fol. 106] (Endorsed): Filed in U. S. Circuit Court of Appeals, May 16, 1946.

(Order substituting A. Ray Oliver, as Executor of the Estate of Lola Castlio Oliver, deceased, as party Appellant.

United States Circuit Court of Appeals

Eighth Circuit

May Term, 1946.

Friday, May 17, 1946.

Lola Castlio Oliver, and A. Ray Oliver, her husband, and Mrs. B. I. Castlio (also known as B. Irene Castlio), Appellants,

No. 13,174. vs.

United States of America.

Appeal from the District Court of the United States for the Eastern District of Missouri.

There is this day brought to the attention of the Court the motion of A. Ray Oliver, as Executor of the Estate of Lola Castlio Oliver, deceased, for voluntary substitution as a party to this appeal in lieu of the appellant Lola Castlio Oliver, and also certified copy of Letters Testamentary granted by the Probate Court of St. Charles County, Missouri, to said A. Ray Oliver, as Executor, etc.

In pursuance of said motion and Letters Testamentary, It is Ordered by this Court that the said A. Ray Oliver, as Executor of the Estate of Lola Castlio Oliver, deceased, be, and he is hereby, substituted as a party appellant in lieu of the appellant Lola Castlio Oliver.

May 17, 1946.

[fol. 107] (Clerk's Certificate.)

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein A. Ray Oliver, as Executor of the Estate of Lola Castlio Oliver, deceased, and A. Ray Oliver, her husband, and Mrs. B. I. Castlio (also known as B. Irene Castlio), were Appellants and the United States of America was Appellee, No. 13,174, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 20th day of May, A. D. 1946.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 108] SUPREME COURT OF THE UNITED STATES

No. 151—October Term, 1946

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 7 1946
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDGAR S. ALBRECHT and GERALDINE ALBRECHT, His Wife, and ALBERT W. ALBRECHT, JR., and VIRGINIA ALBRECHT, His Wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. [redacted] 148

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

GEORGE EIGEL,
Counsel for Petitioners Albert W. Albrecht, Jr., and Virginia Albrecht, His Wife.

WILLIAM L. IGOE,
RICHMOND C. COBURN,
Counsel for Petitioners Edgar S. Albrecht and Geraldine Albrecht, His Wife.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDGAR S. ALBRECHT and GERALDINE ALBRECHT, His Wife, and ALBERT W. ALBRECHT, JR., and VIRGINIA ALBRECHT, His Wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now Edgar S. Albrecht and Geraldine Albrecht, his wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered and entered on the 9th day of April, 1946, in a cause entitled United States of America, Appellant, vs. Edgar S. Albrecht and Geral-

dine Albrecht, his wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, his wife, Appellees, designated in that Court as No. 13223 Civil.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit upon which its judgment was entered has not yet been reported but is set out in the Record (R. p. 294).

JURISDICTION.

The jurisdiction of this Court is invoked by Section 240-(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 [28 U. S. C. A., Sec. 347 (a)].

The judgment of which review is sought was entered on April 9, 1946, but did not become final until April 30, 1946, when petitioners' (appellees') Petition for Rehearing was denied (R. p. 321).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The constitutional provision involved is Amendment V to the Constitution of the United States which provides in part "* * * nor shall private property be taken for public use, without just compensation."

The statutory provision involved is 40 U. S. C. A., Sec. 258a, c. 307, Sec. 1, 46 Stat. 1421. This statute is filed herewith as an appendix.

STATEMENT.

The petitioners were the owners of certain land located in St. Charles County, Missouri. On the 9th day of December, 1940, they signed a written offer designated an "Option to Purchase Land" to sell this land to the United States of America for the sum of $21,425 (R. pp. 27-29). This offer was accepted by the Government on the 17th day of December, 1940 (R. p. 29).

The Government assumed possession as it had a right to do under the contract and has remained in continuous possession ever since. But subsequently and on the 9th day of April, 1941, it repudiated its agreement and filed a condemnation proceeding against the petitioners in the United States District Court for the Eastern District of Missouri to acquire title to the land in that manner (R. pp. 8-15). This proceeding was in the usual form and was brought pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C. A., Sec. 257), and the Act of Congress approved July 2, 1917 (50 U. S. C. A., Sec. 171), as amended, which authorized the acquisition by the Secretary of War of land suitable and necessary for military purposes (R. pp. 9-15). On the same day the condemnor filed a Declaration of Taking which recited, among other things (R. pp. 15-18):

> "1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a), * * *."

Just compensation for the land taken was estimated therein to be $2,232.00 and that sum was deposited in the registry of the court (R. p. 18). Also on the same day an order was entered vesting the title to the land in question in the Government (R. pp. 18-20).

The landowners filed answers asserting that the parties to the proceeding had entered into a contract prior to the filing of the suit and requesting the court to fix the award in the condemnation proceedings at the amount mentioned in the contract, to-wit, $21,425.00, with interest thereon at six per cent (6%) per annum from the date of the acceptance of the contract, to-wit, December 17, 1940 (R. pp. 21-27).

No proceedings were had in this cause to fix the value of the property taken until this Honorable Court, in the companion cases of **Muschany v. United States** and **Andrews v. United States**, 324 U. S. 49, 65 S. Ct. 442, decided that the so-called Options to Purchase Land were valid and, in effect, fixed the amount of the award in each condemnation proceeding at the amount agreed upon in the Option to Purchase Land applicable to each such proceeding. Thereafter, and on the 30th day of March, 1945, the Government filed a motion requesting the court to enter a judgment condemning the property and fixing the landowners' compensation at the sum of $21,425.00 and directing the condemnor to pay into the registry of the court the deficiency of $19,193.00, but without allowing the landowners any interest (R. pp. 30-31). On the 2nd day of May, 1945, the petitioners filed an answer to the Government's motion requesting the court to enter a judgment condemning the land and fixing the compensation for the taking of the land at $21,425.00 but praying the court to also award the petitioners interest at the rate of six per cent (6%) per annum upon said $21,425.00 from the date of taking on or about December 17, 1940, to the making of the deposit ($2,232.00) at the time of the filing of the Declaration of Taking on April 7, 1941, and with interest at the same rate on the deficiency of $19,193.00 from April 7, 1941, until the payment of said deficiency (R. pp. 32-34). On May 17, 1945, the Government paid into court the deficiency of $19,193.00 (R. p. 34).

Because of the large number of cases pending in the said United States District Court arising under the same circumstances and because of the widespread interest therein, all of the so-called Weldon Spring cases were submitted at the same time to a three-judge court consisting of the three United States District Judges sitting in the Eastern Judicial District of Missouri (R. p. 37), but each Judge ruled individually on each of said cases pending before him.* On June 29, 1945, the District Court, in the proceeding to condemn the land of the petitioners, entered a judgment condemning the land and fixing the compensation at the sum mentioned in the contract, to-wit, $21,425.00 plus interest in the sum of $4,727.87, being the equivalent of six per cent (6%) interest on the deficiency of $19193.00 from the 9th day of April, 1941, to the 17th day of May, 1945 (R. pp. 38-43). Subsequently, the Government took an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 1). On April 9, 1946, said United States Circuit Court of Appeals filed its memorandum opinion (R. pp. 294-296) and entered a judgment in said cause reversing the judgment of the District Court (R. pp. 303, 304). On the same day memorandum opinions were filed by said United States Circuit Court of Appeals in appeals from companion cases entitled and designated United States of America, appellant, v. Q. W. S. S. Realty & Investment Company, appellee, No. 13,226; United States of America, appellant, v. Edward J. Linnenbringer et al., appellees, No. 13,227, and United States of America, appellant, v. Dennis B. Pitman et al., appellees, No. 13,228. This appeal and the last mentioned appeals were decided upon the basis of the court's

*Judge Moore and Judge Duncan ruled that the landowners were entitled to interest in the cases pending before them. Judge Moore's opinion on the subject is reported at 61 F. Supp. 199, Judge Duncan filed a memorandum opinion (R. pp. 36, 37). Judge Hulen ruled that the landowners were not entitled to interest in an opinion reported at 60 F. Supp. 741. The instant case is one of several pending before Judge Duncan.

opinion entered the same day in the leading companion case entitled and designated Lola Castlio Oliver et al., appellants, v. United States of America, appellee, No. 13,174 (R. pp. 296-303).

Thereafter, and on the 23rd day of April, 1946, and within the time allowed by the rules of the said United States Circuit Court of Appeals, the petitioners filed their Petition for Rehearing (R. p. 307). This petition was on the 30th day of April, 1946, denied by the said United States Circuit Court of Appeals, on which day said judgment of the said United States Circuit Court of Appeals in this cause became final (R. p. 321).

The duly certified record, including all the proceedings in this cause in said District Court and in said United States Circuit Court of Appeals, is filed herewith under separate cover, together with the requisite number of printed copies thereof.

QUESTIONS PRESENTED.

The questions presented by this Petition for a Writ of Certiorari are:

1. Did the petitioners, as landowners, waive their right to interest from the date of taking to the date of payment by entering into the contract in question?

2. Were the petitioners, as landowners, denied their statutory rights by the failure to allow them interest from the date of taking to the date of payment of the award?

3. Were the petitioners, as landowners, denied just compensation guaranteed them by the Constitution of the United States by the failure to allow them such interest?

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

2. In holding that the landowners by their successful defense of the contract in the condemnation proceeding thereby changed the nature of the proceedings so as to preclude recovery of interest for the period between the taking of the property and payment.

3. In refusing to allow interest against the Government for delay.

4. In refusing to recognize that a statute existed which required the Government to pay the landowners interest.

5. In refusing to hold that the Government was estopped to deny the landowners' right to interest.

6. In refusing to accord the landowners "just compensation" as required by the Constitution of the United States.

7. In distinguishing the opinion of the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Court of Appeals erred in construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

The Court recognized the well established rule that "just compensation" guaranteed by the Fifth Amendment to the Constitution of the United States to a landowner whose property has been taken for public purposes, where the taking precedes the payment, includes interest as well as the fair market value of the property at the time of the taking.

Shoshone Tribe of Indians v. United States, 299 U. S. 476, 57 S. Ct. 244;
Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;
United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281.

This rule has been adopted by Congress in the enactment of 40 U. S. C. A., Sec. 258a, under which the Government proceeded in this case, which provides in part as follows:

> "Upon the filing (of) said Declaration of Taking and of the deposit in the Court, * * * said compensation shall be ascertained * * * and the said judgment shall include, as part of the just compensation awarded, interest at the rate of six per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the Court."

Interest is awarded to compensate the owner for loss of

possession of his property or postponement of the enjoyment of the money received for the taking of his property.

Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354.

The Court of Appeals also recognized the fact that in condemnation proceedings the Government and the landowner may by contract agree on the value of the land rather than to have the same fixed by a commissioners' award or a jury verdict. Such was decided by this Court in **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231. The Court of Appeals quite correctly said that in drawing such a contract the parties could provide that the amount agreed upon therein should constitute the fair market value of the land or could stipulate that the amount agreed upon should include not only the fair market value of the land at the time of taking but other items of damage as well, i. e., interest, when the taking occurs before the payment. But it is submitted that the Court of Appeals erred in construing the contract in question as evidencing the intent of the parties thereto that the $21,425 agreed upon should include all items of just compensation and not merely the agreed value of the land at the time of the taking.

Since by virtue of the Fifth Amendment to the Constitution of the United States and 40 U. S. C. A., Sec. 258a, a landowner whose property is taken before payment is made is entitled to interest as well as the fair market value of the property at the time of taking, it follows that the landowners in the instant case were entitled to such interest unless they waived their right to the same by entering into a contract. A reading of the contract reveals that no such waiver is contained therein. In fact, interest is not mentioned anywhere within its four corners (R. pp. 27-29). The $21,425 is referred to variously as "the gross sales price" (R. p. 28), "the agreed purchase price" (R. p. 28)

and "the agreed valuation" (R. p. 29). If anything, these terms are more closely related in meaning to the fair market value at the time of taking than they are to interest. Certainly that is so of the phrase "the agreed valuation". It should be noted that the contract expressly provided that if the title to the land was not approved by the Attorney General, the Government should acquire the land by condemnation proceedings and in such proceedings "a consent verdict fixing the award at the agreed valuation" should be entered (R. p. 29). If such had occurred and if the Government had delayed payment of the award, no one would deny the right of the landowners to interest for the delay in payment. This indicates that the amount agreed upon in the contract served the same purpose as an award, which is always the fair market value of the property at the time of the taking, and does not include interest for delay in payment of the award.

The Court of Appeals' conclusion that the amount fixed in the contract included interest as well as the fair market value at the time of the taking seems to be based in the main, if not entirely, upon the fact that by the contract the Government was granted the right of immediate possession as well as title to the land, and upon the construction by the Court of Appeals that the contract did not fix a time within which payment was required. From this the Court apparently believed that it was the right of the Government under the contract to acquire possession and retain it indefinitely without paying for the use of the property, which, incidentally, is almost what the Government did. No such construction of the contract is justified either in the letter or the spirit of the instrument. It is true that the contract did give the Government immediate possession, but by its very terms the Government could remain in possession only "* * * until such time as said land is conveyed to the Government * * *, the title

approved * * * and the agreed purchase price paid by the Government * * *" (R. p. 28). A subsequent provision in the contract required the Government to make payment as follows (R. p. 29):

> "Upon furnishing of final certificate of title * * * the agreed purchase price above mentioned will be paid by the Government to the undersigned."

From this it will be seen that although the Government obtained the right of immediate possession under the contract, it could only remain in possession until it paid the agreed purchase price and this it was required to do when a final certificate of title was furnished it by the landowners, and it could not remain in possession of the land indefinitely under the contract.

It is submitted that the proper construction to be laid upon the contract is that which the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190, gave to a similar contract. There condemnation proceedings were instituted by the United States of America against certain land which it desired to acquire for military purposes. After the petition had been filed the Government and the landowners entered into a stipulation agreeing that the court "* * * is hereby authorized and petitioned to enter without further notice a final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any declaration of taking which may hereafter be filed by the plaintiff, vesting the title to the above described property in the United States of America, and adjudging just compensation for the lands taken, to be in the sum of * * *." About seven months elapsed between the execution of this stipulation and the payment of the amount due thereunder. In holding that the landowners were entitled to interest in addition to the

amount agreed upon in the stipulation for the period of time between the signing of the same and the payment of the amount agreed upon, the court said (149 Fed. [2d], l. c. 193):

> "* * * when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right.
>
> "* * * But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract." (Emphasis of the court.)

Since more than four years elapsed between the signing of the contract in the case at hand and the payment of the amount thereunder, it is interesting to observe that the Court of Appeals in **United States v. Baugh** found that a delay in payment of seven or eight months was an unreasonable period.

Many landowners who formerly lived within the area taken by the Government are adversely affected by the decision of the Court of Appeals, as their right to interest is based on identical facts and legal principles as are found in this proceeding. The determination of this case is a matter of great public interest.

II.

The Court of Appeals fell into error when it held that the landowners, by their successful defense of the validity of the purchase contract, changed the nature of the proceeding instituted by the Government. When the Govern-

ment repudiated the contract, the landowners were accorded the election of recognizing the breach and allowing the fair market value of the property to be fixed by a commissioners' award or by a jury verdict, or if they did not want to run the risk of such litigation of having the fair market value established at the amount agreed upon in the contract. The landowners elected to take the latter course. This illustrates that the contract in the case at hand, in fixing the fair market value of the property at $21,425, served the function of a commissioners' award or a jury verdict. Such was the interpretation placed by this Court upon a similar contract entered into between the Government and the landowners and which was also repudiated by the Government by the bringing of a condemnation proceeding. **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231. There this Court said (308 U. S., l. c. 281):

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. * * * The effect of such an agreement is to fix the value of the easement when the authority of the court is invoked against a party to the agreement to acquire good title."

And in the companion case of **Muschany v. United States**, 324 U. S. 49, 65 S. Ct. 442, this Court, referring to a contract identical in form to the one in the case at hand, said (65 S. Ct., l. c. 445):

> "The option * * * provides for an agreed valuation at the option price in case of condemnation."

The fixing of the fair market value of the property by the contract instead of by a commissioners' award or a jury verdict did not in anywise change the nature of the condemnation proceeding brought by the Government. As

was said in **United States v. Baugh**, supra (149 Fed. [2d], l. c. 192):

> "The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Since the land in the case at hand was taken over four years before payment was made, if the landowners had elected to recognize the breach of the contract by the Government and had permitted commissioners or a jury to fix the fair market value of the property, beyond any question they would have been entitled to interest for the time during which payment was postponed in addition to the fair market value of the property. Having elected, however, to uphold the contract and to have the fair market value fixed in accordance with its terms, the only effect upon the proceeding is to eliminate the necessity of a commissioners' award or a jury verdict to fix the value of the property, and the landowners are entitled to interest for the postponed payment in the same manner in which they would have been entitled to interest had the value of the property been fixed by award or verdict. A reading of the entire record of the case shows that the action was instituted as a condemnation proceeding pursuant to the Federal Statutes in such cases made and provided, including the Declaration of Taking statute (40 U. S. C. A., Sec. 258a), which expressly requires the payment of interest for delayed payment. And the proceeding continued to its end in compliance with condemnation practice with the single exception of the agreement between the parties being substituted for the Commissioners' award or jury verdict.

III.

The Court of Appeals erred in refusing to allow interest against the Government for delay. It is true that as a general rule interest will not be allowed against a sovereign in the absence of a statute or express contract imposing the same. **United States v. North Carolina**, 136 U. S. 211, 10 S. Ct. 920; **United States v. Rogers**, supra; **Seaboard Airline Ry. Co. v. United States**, supra. But it is equally well settled that because of the constitutional guaranty of "just compensation," this rule is not applied in condemnation cases where the property is taken before payment is made.

Seaboard Airline Ry. Co. v. United States, supra;
United States v. Sargent, 162 Fed. 81, 89 C. C. A. 81, dismissed 215 U. S. 618, 30 S. Ct. 410;
Van Wagoner, Highway Commissioner, v. Morrison, 279 Mich. 285, 271 N. W. 760;
State ex rel. Steubenville Ice Co. v. Merrell, Director of Highways, 127 Ohio St. 453, 189 N. E. 116.

In **Seaboard Airline Ry. Co. v. United States**, supra, this Court said:

> "The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

IV.

But even if the rule that interest is not allowed against a sovereign in the absence of an express contract or statute were applicable to the case at hand, such a statute

existed. See 40 U. S. C. A., Sec. 258a. In fact, the Government elected to proceed under the statute by filing a Declaration of Taking (R. pp. 15-18). The decision of the Court of Appeals clearly deprives the landowners of their statutory rights.

V.

The Court of Appeals erred in refusing to hold that the Government was estopped from denying the landowners' right to interest. Upon the institution of the condemnation proceeding by the Government, it filed a Declaration of Taking pursuant to the express terms of 40 U. S. C. A., Sec. 258a (R. pp. 15-18), and obtained valuable benefits from invoking that statute because an order and judgment was entered upon the Declaration of Taking upon the same day the condemnation proceeding was filed, investing the Government with immediate possession and title to the land in question (R. pp. 18-20). But this statute also expressly required the Government to pay interest to the landowners upon the difference between the amount paid into Court at the time of the filing of the Declaration of Taking and the amount finally awarded the landowners. It is fundamental that a party will not be permitted to enjoy the benefits of a transaction and repudiate the obligations arising therefrom, especially where the other party to the transaction has been placed at a disadvantage, as the landowners were in the case at hand by being deprived of the possession and title to their property. **Davis v. Wakelee**, 156 U. S. 680, 15 S. Ct. 555; **Officer v. J. L. Owens & Co.**, 252 Fed. 337; **Horne v. Beattie**, 167 La. 647, 120 So. 38; **Mauritz v. Schwind**, 101 S. W. (2d) 1085 (Tex. C. A.); **Southern Surety Co. v. Illinois Powder Mfg. Co.**, 31 S. W. (2d) 314 (Tex. C. A.), in which the Court held that where a party invokes a statute as the basis of his claim, he must take the statute as a whole. A comparable situation has arisen occasionally in condemnation proceedings where

a landowner accepts money awarded to him in condemnation proceedings and then undertakes to deny the validity of the proceedings. In such a case the Supreme Court of Missouri, in **Chicago Great Western Ry. Co. v. Kemper,** 256 Mo. 279, 166 S. W. 291, adopted the following language found in the case of **Holland v. Spell,** 144 Ind. 561, 42 N. E. l. c. 1015:

> "We can conceive no good reason why he should, in good conscience, be permitted to receive all the benefits of the proceeding, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits."

VI.

By refusing the landowners' interest the Court of Appeals denied them "just compensation" guaranteed by the Fifth Amendment to the Constitution of the United States. This point has already been discussed heretofore. In so doing, the Court of Appeals refused to follow the latest decisions of this Honorable Court as to the meaning of "just compensation".

Shoshone Tribe of Indians v. United States, 299 U. S. 476, 57 S. Ct. 244;
Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;
United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281.

VII.

The Court of Appeals erred in distinguishing the decision of the Fifth Circuit Court of Appeals in **United States v. Baugh,** 149 Fed. (2) 190. Rather indecisively the Court of Appeals in the instant case said that the **Baugh** case was distinguishable because "* * * the contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of a con-

demnation then proceeding" (R. p. 303). It is true that the contract in the **Baugh** case was entered into after the condemnation proceeding was instituted, whereas in this case it was entered into before the proceedings were begun. But, of course, distinctions of no significance are to be given no weight. What difference did it make in the determination of the question of whether or not the landowners were entitled to interest, that the stipulation between the parties to the litigation was executed *before* or after the condemnation proceedings were begun? The question is to be determined by these factors and these alone: (1) was there a taking prior to payment, and (2) if so, did the contract of the parties waive the landowners' right to interest? Obviously, the time of the execution of the contract as related to the commencement of the proceedings is of no importance whatever in the determination of this question. A clear conflict exists between the opinion of the Eighth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in the **Baugh** case.

PRAYER.

Wherefore, your petitioners pray, for the reasons stated, that this petition for certiorari be granted.

Respectfully submitted,

GEORGE EIGEL,
Counsel for Petitioners Albert W. Albrecht, Jr., and Virginia Albrecht, his wife.

WILLIAM L. IGOE,
RICHMOND C. COBURN,
Counsel for Petitioners Edgar S. Albrecht and Geraldine Albrecht, his wife.

APPENDIX.

Title 40, U. S. C. A., § 258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto:

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States,

and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDGAR S. ALBRECHT and GERALDINE ALBRECHT, His Wife, and ALBERT W. ALBRECHT, JR., and VIRGINIA ALBRECHT, His Wife,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 148.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDGAR S. ALBRECHT and GERALDINE ALBRECHT, His Wife, and ALBERT W. ALBRECHT, JR., and VIRGINIA ALBRECHT, His Wife, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. 148.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONERS.

This case is here on writ of certiorari issued by this Court on the 14th day of October, 1946, directed to the United States Circuit Court of Appeals for the Eighth Circuit to review the opinion and judgment of said Court in the case of United States of America, Appellant, v. Edgar S. Albrecht and Geraldine Albrecht, His Wife, and Albert W. Albrecht, Jr., and Virginia Albrecht, His Wife, Appellees, No. 13,223, Civil, in said Court of Appeals.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the above mentioned case, No. 13,223, appears in the printed transcript filed herein

on pages 294-296, inclusive, and is now printed in 155 Fed. (2d) 77. The opinion of the Court of Appeals is a memorandum opinion based upon the opinion rendered by that Court in the case of Lola Castlio Oliver and A. Ray Oliver, Her Husband, and Mrs. B. I. Castlio (also known as B. Irene Castlio), Appellants, v. United States of America, Appellee, No. 13,174, Civil, in said Court of Appeals, which opinion appears in the printed transcript filed herein on pages 296-303, inclusive, and is now printed in 155 Fed. (2d) 73.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 [28 U. S. C. A., Sec. 347 (a)].

The judgment of which review is sought was entered by the Circuit Court of Appeals for the Eighth Circuit on April 9, 1946 (R. pp. 303-304), but did not become final until April 30, 1946, when petitioners' (appellees') Petition for Rehearing was denied (R. p. 321).

An application to withhold a mandate of the said Court of Appeals for thirty days in order to permit petitioners to apply to this Court for writ of certiorari was sustained by the Court of Appeals by order entered on May 10, 1946 (R. pp. 350-351).

A duly certified copy of the Record, including all of the proceedings in this cause in the District Court of the United States and in said Court of Appeals, was filed herein together with the requisite number of copies thereof in compliance with the rules of this Court. The record in this cause is consolidated with the record in the three companion cases entitled and designated in the Court of Appeals as United States of America, Appellant, v. Q. W. S. S. Realty & Investment Company, Appellee, No. 13,226;

United States of America, Appellant, v. Edward J. Linnenbringer et al., Appellees, No. 13,227, and United States of America, Appellant, v. Dennis B. Pitman et al., Appellees, No. 13,228.

The constitutional provision involved herein is Amendment V to the Constitution of the United States which provides in part "* * * nor shall private property be taken for public use, without just compensation."

The statutory provision involved is 40 U. S. C. A., Sec. 258a, c. 307, Sec. 1, 46 Stat. 1421.

STATEMENT.

The petitioners were the owners of certain land located in St. Charles County, Missouri. On the 9th day of December, 1940, they signed a written offer designated an "Option to Purchase Land" to sell this land to the United States of America for the sum of $21,425 (R. pp. 27-29). This offer was accepted by the Government on the 17th day of December, 1940, (R. p. 29).

The Government assumed possession as it had a right to do under the contract and has remained in continuous possession ever since. But subsequently and on the 9th day of April, 1941, it repudiated its agreement and filed a condemnation proceeding against the petitioners in the United States District Court for the Eastern District of Missouri to acquire title to the land in that manner (R. pp. 8-15). This proceeding was in the usual form and was brought pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C. A., Sec. 257), and the Act of Congress approved July 2, 1917 (50 U. S. C. A., Sec. 171), as amended, which authorized the acquisition by the Secretary of War of land suitable and necessary for military purposes (R. pp. 9-15). On the same day the condemnor filed a Declaration of Taking which recited, among other things (R. pp. 15-18):

"1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a), * * * ."

Just compensation for the land taken was estimated therein to be $2,232.00 and that sum was deposited in the registry of the court (R. p. 18). Also on the same day an order was entered vesting the title to the land in question in the Government (R. pp. 18-20).

The landowners filed answers asserting that the parties to the proceeding had entered into a contract prior to the filing of the suit and requesting the court to fix the award in the condemnation proceedings at the amount mentioned in the contract, to-wit, $21,425.00, with interest thereon at six per cent (6%) per annum from the date of the acceptance of the contract, to-wit, December 17, 1940 (R. pp. 21-27).

No proceedings were had in this cause to fix the value of the property taken until this Honorable Court, in the companion cases of **Muschany v. United States** and **Andrews v. United States**, 324 U. S. 49, 65 S. Ct. 442, decided that the so-called Options to Purchase Land were valid and, in effect, fixed the amount of the award in each condemnation proceeding at the amount agreed upon in the Option to Purchase Land applicable to each such proceeding. Thereafter, and on the 30th day of March, 1945, the Government filed a motion requesting the court to enter a judgment condemning the property and fixing the landowners' compensation at the sum of $21,425.00 and directing the condemnor to pay into the registry of the court the deficiency of $19,193.00, but without allowing the landowners any interest (R. pp. 30-31). On the 2nd day of May, 1945, the petitioners filed an answer to the Government's motion requesting the court to enter a judgment condemning the land and fixing the compensation for

the taking of the land at $21,425.00 but praying the court to also award the petitioners interest at the rate of six per cent (6%) per annum upon said $21,425.00 from the date of taking on or about December 17, 1940, to the making of the deposit ($2,232.00) at the time of the filing of the Declaration of Taking on April 7, 1941, and with interest at the same rate on the deficiency of $19,193.00 from April 7, 1941, until the payment of said deficiency (R. pp. 32-34). On May 17, 1945, the Government paid into court the deficiency of $19,193.00 (R. p. 34).

Because of the large number of cases pending in the said United States District Court arising under the same circumstances and because of the widespread interest therein, all of the so-called Weldon Spring cases were submitted at the same time to a three-judge court consisting of the three United States District Judges sitting in the Eastern Judicial District of Missouri (R. p. 37), but each Judge ruled individually on each of said cases pending before him.* On June 29, 1945, the District Court, in the proceeding to condemn the land of the petitioners, entered a judgment condemning the land and fixing the compensation at the sum mentioned in the contract, to-wit, $21,425.00 plus interest in the sum of $4,727.87, being the equivalent of six per cent (6%) interest of the deficiency of $19,193.00 from the 9th day of April, 1941, to the 17th day of May, 1945 (R. pp. 38-43). Subsequently, the Government took an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 1). On April 9, 1946, said United States Circuit Court of Appeals filed its memorandum opinion (R. pp. 294-296) and entered a judgment in said

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*Judge Moore and Judge Duncan ruled that the landowners were entitled to interest in the cases pending before them. Judge Moore's opinion on the subject is reported at 61 F. Supp. 199. Judge Duncan filed a memorandum opinion (R. pp. 36, 37). Judge Hulen ruled that the landowners were not entitled to interest in an opinion reported at 60 F. Supp. 741. The instant case is one of several pending before Judge Duncan.

cause reversing the judgment of the District Court (R. pp. 303, 304). On the same day memorandum opinions were filed by said United States Circuit Court of Appeals in appeals from companion cases entitled and designated United States of America, appellant, v. Q. W. S. S. Realty & Investment Company, appellee, No. 13,226; United States of America, appellant, v. Edward J. Linnenbringer et al., appellees, No. 13,227, and United States of America, appellant, v. Dennis B. Pitman et al., appellees, No. 13,228. This appeal and the last mentioned appeals were decided upon the basis of the court's opinion entered the same day in the leading companion case entitled and designated Lola Castlio Oliver et al., appellants, v. United States of America, appellee, No. 13,174 (R. pp. 296-303). This court has granted certiorari in each of the last mentioned cases.

Thereafter, and on the 23rd day of April, 1946, and within the time allowed by the rules of the said United States Circuit Court of Appeals, the petitioners filed their Petition for Rehearing (R. p. 307). This petition was on the 30th day of April, 1946, denied by the said United States Circuit Court of Appeals, on which day said judgment of the said United States Circuit Court of Appeals in this cause became final (R. p. 321).

The duly certified record, including all the proceedings in this cause in said District Court and in said United States Circuit Court of Appeals, has been filed herein, together with the requisite number of printed copies thereof.

QUESTIONS PRESENTED.

The questions presented are:

1. Did the petitioners, as landowners, waive their right to interest from the date of taking to the date of payment by entering into the contract in question?

2. Were the petitioners, as landowners, denied their statutory rights by the failure to allow them interest from the date of taking to the date of payment of the award?

3. Were the petitioners, as landowners, denied just compensation guaranteed them by the Constitution of the United States by the failure to allow them such interest?

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

2. In holding that the landowners by their successful defense of the contract in the condemnation proceeding thereby changed the nature of the proceedings so as to preclude recovery of interest for the period between the taking of the property and payment.

3. In refusing to allow interest against the Government for delay.

4. In refusing to recognize that a statute existed which required the Government to pay the landowners interest.

5. In refusing to hold that the Government was estopped to deny the landowners' right to interest.

6. In refusing to accord the landowners "just compensation" as required by the Constitution of the United States.

7. In distinguishing the opinion of the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190.

SUMMARY OF THE ARGUMENT AND ARGUMENT.

The facts and the legal questions in the companion case of A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, Deceased, A. Ray Oliver and B. Irene Castlio, Petitioners, v. United States of America, Respondent, being cause No. 151, October Term, 1946, in this Court, are identical with those presented in this case, the only difference being that in that case the District Court did not allow the landowners interest, whereas in this case the District Court allowed interest. To avoid duplication, therefore, the Summary of the Argument and the Argument contained in the Brief of the petitioners in that cause are adopted by the petitioners Edgar S. Albrecht et al. herein.

CONCLUSION.

It is respectfully urged that the judgment and record of the Court of Appeals for the Eighth Circuit in this case be quashed by this Court and that the judgment of the District Court holding that the landowners are entitled to the value of the land together with interest at the rate of six per cent (6%) per annum on the difference between that value and the amount paid in with the Declaration of Taking should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 148.
EDGAR S. ALBRECHT et al., Petitioners,
v.
UNITED STATES OF AMERICA.

No. 149.
EDWARD J. LINNENBRINGER, Petitioner,
v.
UNITED STATES OF AMERICA.

No. 150.
DENNIS B. PITMAN et al., Petitioners,
v.
UNITED STATES OF AMERICA.

No. 151.
A. RAY OLIVER et al., Petitioners,
v.
UNITED STATES OF AMERICA.

No. 155.
Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,
v.
UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' BRIEF IN REPLY.

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No. 151.
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v.
UNITED STATES OF AMERICA.

No. 155.
Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,
v.
UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONERS' BRIEF IN REPLY.

SUMMARY OF ARGUMENT.

I.

The rule that a sovereign cannot be compelled to pay interest for a delay in making payment is not applicable to the cases at hand because (1) interest in condemnation

suits is not interest in the usual sense of the word but a device used to fix damages suffered by the landowner for the loss of the use of his property from the date of taking to the date of payment, and (2) a statute (40 U. S. C. A., Sec. 258a) did exist which imposed an obligation upon the United States to pay interest.

When the landowners entered into the contracts with the Government the Fifth Amendment to the Constitution of the United States guaranteed them just compensation for a taking of their lands by the United States, and this included damages in the form of interest for any loss of use of their lands caused by a taking before payment. The landowners did not waive this right by entering into the contracts because no language was used therein which expressly or impliedly indicated any intention on the part of the landowners to waive this valuable right. In fact, by implication it is apparent that the parties intended by the contract to fix only the fair market value of the property at the time of the taking.

II.

When the Government attempted to repudiate the contracts the landowners were presented with alternative remedies for the fixing of the fair market value of their land at the time of taking (1) by the contract or (2) by a commissioners' award or jury verdict. But resort to either of these remedies did not prevent the landowners from recovering an additional item of just compensation, i. e., damages in the form of interest for the loss of use of their property from the time of the filing of the Declarations of Taking to the time of the payment of the amounts provided for in the contracts.

III.

The constitutional right of the landowners to damages in the form of interest is confirmed by the Declaration of Taking Statute, and the Government, having resorted to that statute in bringing these condemnation proceedings and having taken the petitioners' lands by orders entered pursuant to the statute, must comply with the obligation imposed by the statute to pay interest.

ARGUMENT.

I.

Petitioners, by Entering Into the Contracts, Did Not Waive Their Right to Interest Guaranteed Them by the Fifth Amendment to the Constitution of the United States.

The Government contends that since the contracts in question contained no express stipulation on the part of the Government to pay interest in the event that the amount due the landowner for the taking of his property was not paid at the time of the taking, the Government cannot be required to pay the petitioners interest because a sovereign cannot be required to pay interest for a delayed payment in the absence of a contract or statute requiring it to do so. The petitioners freely concede that generally absent a contract or statute, the sovereign cannot be held to the payment of interest. However, that rule has no application to the cases at hand because:

1. The use of interest as a device for measuring a landowner's damages for delay in payment of the award in condemnation does not consist in the imposition of an obligation to pay **interest** in the usual sense of the word. In condemnation, interest is not interest at all but is simply an additional item of damages (just compensation) for depriving an owner of a property right, to-wit, the use of his property between the date of the taking and the date of payment.

2. A statute (40 U. S. C. A., Sec. 258a) did exist which imposed an obligation upon the United States to pay interest at six per cent per annum. This statute was employed by the United States in the proceedings when it filed Declarations of Taking and obtained title to the tracts in question (R. Oliver, et al. v.

U. S., pp. 10-14, 15-17; R., Edgar S. Albrecht et al. v. U. S., pp. 15-18, 18-20; R., Q. W. S. S. Realty & Inv. Co. v. U. S., pp. 74-78, 79-83; R., Edward J. Linnenbringer et al. v. U. S., pp. 137-139, 140-142; R., Dennis B. Pitman et al. v. U. S., pp. 216-221, 221-227).

At the time the petitioners entered into the contracts with the Government, the petitioners enjoyed a right to damages for delay in the payment of the fair market value of their property which was guaranteed them by the Fifth Amendment to the Constitution of the United States. It is a fundamental rule of contracts that the law of the place in which the contract is made becomes a part of the contract. This constitutional right of the landowners for damages for loss of use of their property by implication became a part of the contracts in question. It should be borne in mind, too, that these contracts were prepared by the Government and not by the landowners (**Muschany v. U. S.**, 324 U. S. 49, l. c. 52), so that any ambiguity in the contract should be construed against the Government and not against the landowners. Unless this constitutional right was waived by the petitioners, either expressly or by clear implication, the landowners are entitled to recover interest as part of just compensation for the taking of their property. It is well settled that a right will not be deemed waived except by some clear or unequivocal act or expression on the part of the obligee. **Public Warehouses of Matanzas, Inc., et al. v. Fidelity & Deposit Co. of Maryland**, 77 F. (2d) 831 (C. C. A. 2); **Victor Products Corp. v. Yates-American Machine Co.**, 54 F. (2d) 1062 (C. C. A. 4); **Reed v. Bankers Union of the World**, 121 Mo. App. 419, 99 S. W. 55.

In **Michigan Savings & Loan Association v. M. K. & T. Trust Co.**, 73 Mo. App. 161, the court quoted the following statement often used by the Missouri courts (73 Mo. App., l. c. 165):

> "'To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to estoppel on his part.'"

It should also be observed that although generally a contract is construed in light of the intention of both parties to the instrument, the waiver of a right depends upon the intention of the obligee only. **Champion Spark Plug Co. v. Automobile Sundries Co.**, 273 F. 74 (C. C. A. 2); **Stiepel v. The German American Mutual Life Association**, 55 Mo. App. 224, where the court said (55 Mo. App., l. c. 233): "Waiver depends solely upon the intention of the party against whom it is invoked, * * *."

The Government does not contend that there is any express language in the contracts which waived the right of the landowners to damages for delay, but does say that impliedly this right was waived. The implied waiver is said to arise in this way—by the contracts the Government was given the right to possession until the Government paid for the lands, but no time was fixed for payment. From this it is argued that the delay in payment which occurred in these cases is not compensable but is only what the Government was entitled to in any event under the contracts. This is probably the controlling theory of the opinion of the Eighth Circuit Court of Appeals denying the landowners interest. **Oliver v. United States**, 155 F. (2d), l. c. 75, 76. The logical result of the opinion is that the Government could have remained in possession of the landowners' property without making payment for an indefinite period of time—not only the four years which elapsed between the filing of the Declarations of Taking and the ultimate payment of the amounts called for in the contracts, but ten, twenty, thirty years or more. Not only can the opinion of the Court of Appeals be thus reduced to absurdity, but in fact its interpretation of the contracts

is not warranted by the language of the instruments. It is true that no fixed time was provided for payment (in the event of voluntary conveyancing). The contracts merely required payment by the Government when the landowners furnished a final certificate of title showing good and marketable title vested in the United States (R., Oliver v. U. S., p. 37). But this does not mean that payment could be deferred indefinitely. It is axiomatic that where a contract provides for the doing of a thing but fixes no time within which it shall be done, it will be implied that the parties intended that the act should be performed within a reasonable time. This very rule was invoked in **United States v. Stott**, 140 F. (2d) 941 (C. C. A. 8), where the United States and landowners had entered into a contract for the acquisition of land by the former. The contract there permitted the Government to bring condemnation proceedings in the event that good title could not be acquired otherwise, but no time was fixed for the institution of such proceedings. No such action was taken for approximately a year and a half, when the landowners rescinded the contract. It was held that the contract gave the Government only a reasonable time within which to proceed, and that it had failed to act within that time. Under the contracts in the cases at hand the Government doubtless had the right to enter into possession and remain in for a reasonable time to permit execution of the contracts without being required to pay any further compensation than that fixed in the instruments. But without question, that reasonable time came to an end when the Government repudiated the contracts and brought condemnation suits in June, 1941. The bringing of these suits and their prosecution to a final judgment made the provisions of the contracts relating to voluntary conveyancing impossible of performance and certainly terminated the right of the Government to remain in possession pursuant to the contracts. In fact, the Government obtained

immediate possession of the tracts in question at the time of filing the condemnation proceedings by orders entered pursuant to the Declarations of Taking (R., Oliver et al. v. U. S., p. 17; R., Albrecht et al. v. U. S., p. 20; R., Q. W. S. S. Realty & Inv. Co. v. U. S., p. 83; R., Edward J. Linnenbringer et al. v. U. S., p. 142; R., Dennis B. Pitman et al. v. U. S., p. 227). After the filing of the condemnation proceedings the Government clearly held possession by virtue of the orders entered pursuant to the Declarations of Taking, and not by reason of the contracts.

If any implication with reference to the payment of interest can be drawn from the contracts, it is that the Government was required to make such payment. Suppose that the Government had instituted condemnation proceedings pursuant to the terms of the contracts for the purpose of clearing title not approved by the Attorney General, but had failed to pay into court the amounts called for by the contracts. Would the Government have been required to pay interest? Here, according to the contracts (R., Oliver v. U. S., p. 37), the Government was obliged to—

> "• • • proceed to acquire the land by condemnation proceedings • • • **under a consent verdict fixing the award at the agreed valuation** • • • and will upon filing its petition in such proceedings deposit said agreed purchase price with the Clerk of said Court, • • •." (Emphasis ours.)

By this paragraph a "consent verdict" would have been entered in the Oliver case "fixing the award" at $70,000. The "verdict" of a jury in a condemnation case or an "award" can only fix the market value of the property at the time of taking and the interest is computed by the Court in its judgment entered upon the verdict. This is so because in condemnation proceedings payment frequently is not made until after the jury verdict or commis-

sioners' award, so that the period during which interest runs can be known only to the Court. **Reed v. C. M. & St. P. Ry. Co.**, 25 F. 886 (C. C., N. D. Iowa, E. D.). See also **Weisner Valley Land & Water Co. v. Ryan**, 190 F. 417 (C. C. A. 9). Thus it is quite evident from the express language employed in the contract that interest would have been allowed in the Oliver case from the filing of the Declaration of Taking to the final payment of the deficiency upon the difference between the $70,000 called for by the contract and the $21,500 paid into Court at the time of the Declaration of Taking. It is submitted that the Government, by breaching its contracts and filing condemnation suits, should not be permitted to benefit by its wrongdoing by being absolved of the obligation to pay interest.

It is submitted that **Danforth v. United States**, 308 U. S. 271, is helpful to the solution of the cases at hand. There after a contract had been entered into fixing the value of a flowage easement and providing for the bringing of condemnation proceedings to acquire title to the easement, the Government, as in these cases, attempted to repudiate the contract and brought condemnation proceedings to acquire the land, insisting that the fair market value should be fixed by commissioners. In considering the liability of the Government for the additional item of damages in the form of interest this Court discussed at considerable length the question of whether a taking had occurred before payment and finally denied interest because no prior taking had occurred. It is evident that if this Court had believed that the landowners had waived their right to interest by entering into the contract it would have said so, thus obviating the necessity of ruling the question of whether a prior taking had occurred. This case is authority for the proposition that the contract there fixed only the fair market value of the easement at the time of taking. It will be observed that the lan-

guage of this contract (Par. 3, 308 U. S., l. c. 279) bears a close resemblance to the language found in the paragraph providing for the bringing of condemnation proceedings in the contracts now in question (R., Oliver et al. v. U. S., p. 37). Both contracts use the words "verdict" and one employs "awarded" and the other "award." Such language can only refer to methods of establishing the fair market value of property at the time of taking, which would not include the additional item of damages in the form of interest. Upon the authority of **Danforth v. U. S.**, the contracts in question did no more than to fix the fair market value at taking, and did not include damages for loss of use of the lands subsequent to the taking.

II.

The Obligation of the United States to Pay Interest as Part of "Just Compensation" Is Not Inconsistent With the Government's Obligation to Pay the Fair Market Value at the Time of Taking Fixed by the Contracts.

The Government contends that when it repudiated the contracts in question the petitioners were presented with a choice of two courses of action—the first, to insist upon receiving the prices fixed in the contracts; the second, to acquiesce in the Government's attempted repudiation of the contracts and to receive the "just compensation" guaranteed by the Constitution (Government's Brief, p. 23). It is respectfully submitted that this statement constitutes a confusion of substantive rights with procedural rights. Under no circumstances were the landowners entitled to more than just compensation. This was a substantive right arising from the taking of their lands. When the Government breached the contracts the landowners were presented with a choice of **remedies** as to the manner in which the fair market value of their property should be established: (1) by contract or (2) by a commissioners' award

or a jury verdict. But in either case the landowners, not having waived their right to interest by the contracts, were entitled to additional damages for the loss of use of their property from the date of the filing of the Declarations of taking to the date of payment of the fair market value of the lands. The landowners elected to have the fair market value of their lands fixed by contract, but this did not in any wise affect their right to such additional damages.

III.

The Declaration of Taking Act Confirms the Constitutional Right of the Landowners to Interest as Damages for Loss of Use of Their Property.

It is true that the Declaration of Taking Statute (40 U. S. C. A., Sec. 258a) merely codified the case law construction of "just compensation" guaranteed by the Fifth Amendment to the Constitution by requiring the payment of interest as a part of just compensation where the taking preceded payment. Since the landowners did not waive their right to interest by entering into the contracts, their constitutional right to interest as an additional item of compensation is simply confirmed by the Declaration of Taking Statute. The Government brought the proceedings in question pursuant to that statute. It took title and possession by orders entered pursuant to the Declarations of Taking. Although the Government argues in its brief that there was no "taking" pursuant to the Declarations of Taking because the landowners had previously conveyed their lands to the Government (Government's Brief, pp. 38-39), counsel for the Government admitted during the argument that the Government probably would claim title to the lands in question through the orders entered pursuant to the Declarations of Taking rather than through any prior deeds. This admission is amply confirmed by the judgments entered in these cases which recite:

"* * * upon the filing of said Declaration of Taking, the fee simple title to said tract of land therein described and herein described became vested in the United States of America, * * *."

(R., Oliver et al. v. U. S., p. 49; R., Albrecht et al. v. U. S., p. 40; R., Q. W. S. S. Realty & Inv. Co. v. U. S., p. 106; R., Edward J. Linnenbringer et al. v. U. S., p. 182; R., Dennis B. Pitman et al. v. U. S., p. 270).

Moreover, in some of the cases, as in Oliver v. United States, no instrument of conveyance was ever executed. And as we have heretofore said, the Government's right to possession for a reasonable time to permit the execution of the contracts terminated with the filing of the condemnation suits. Takings did occur pursuant to the Declarations of Taking and, having enjoyed the benefits of the Act, the Government is in no position to deny the obligations arising therefrom, i. e., the duty to pay interest at the rate of 6% per annum from the filing of the Declarations of Taking to the payment of the deficiencies upon the difference between the amount called for in the contracts and the amount paid into court pursuant to the Declarations of Taking.

In **United States v. Katz Drug Co.**, 150 F. (2d) 681 (C. C. A. 8), the Government brought condemnation proceedings against the defendant to obtain possession of premises held under a lease by Katz. The lease expired on June 30, 1943, and Katz was awarded the fair market value of the possession of the property to that date, although a mortgage on the property was foreclosed prior thereto on January 22, 1943, for the reason that the trial court found that Katz was prepared to prevent the foreclosure by a purchase of the mortgage if no condemnation suit had been filed. Consistent with this finding, the trial court refused to award the owner of the property any compensation for the period from January 22, 1943, to June 30, 1943, and the

United States paid the owner the amount awarded by the trial court. On appeal the United States contended that Katz was not entitled to compensation for possession from January 22 to June 30, 1943, and that if anyone was, it was the owner. The Eighth Circuit Court of Appeals refused to permit the Government to take this inconsistent position, saying (150 F. [2d], l. c. 686):

> "* * * the United States will therefore not be permitted to accept the benefit of that ruling for the purpose of making payment of compensation to the property owners, and at the same time deny its validity for the counter-purpose of escaping payment of complementary compensation to Katz."

The doctrine of this case is squarely applicable to the one at hand. Having invoked the Declaration of Taking statute and enjoyed the benefits thereof, the Government should not be permitted to escape the obligation of the statute to pay just compensation in the form of interest for the use of the land between the filing of the Declarations of Taking and the payment of the deficiencies.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 194...

EDWARD J. LINNENBRINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. [redacted] 149

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 194..

EDWARD J. LINNENBRINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Edward J. Linnenbringer and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit rendered on the 9th day of April, 1946, reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of this petitioner and against the respondent herein, which said judgment of the said Circuit Court of Appeals became final on the 30th day of April, 1946, by the overruling by that Court of petitioner's petition for rehearing.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered April 9, 1946 (R. 305). The Petition for Rehearing was denied April 30, 1946 (R. 341). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, ch. 229 (28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347).

QUESTIONS PRESENTED.

(1) Whether there is not a conflict between the decision of the Circuit Court of Appeals in the instant case and a decision of the Circuit Court of Appeals of the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190. In this case it was held that a landowner in a proceeding instituted by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C., Section 258 a, was not entitled to interest upon the difference between the amount deposited in the registry of the District Court as the estimated just compensation and the amount ultimately awarded the landowner, which amount was based upon the agreed purchase price of the land fixed by a contract and was the amount the United States moved the District Court to fix as compensation for the land; and this case held that the price of the land had been fixed by contract and that interest could not be allowed for delay in the performance of a contract or obligation of the United States. The decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. 2d 190, held that interest was allowable to the landowner in a condemnation proceeding instituted by the United States pursuant to the Second War Powers Act, 50 U. S. C. A., Appendix, Sec. 632. The interest allowed

was based upon delay of seven months in depositing in court the amount the owner had agreed to accept as just compensation in a contract between the United States and landowner.

(2) Whether the Circuit Court of Appeals has not decided a federal question in conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271. The Circuit Court of Appeals in this condemnation proceeding, instituted by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, after it had repudiated a now admittedly valid and binding option contract, held that the landowner was not entitled to interest on the undeposited amount of value as provided in that Act because the landowner "converted the condemnation proceeding into one controlled * * * by the terms of the purchase contract," and that interest cannot be added to an obligation of the United States. This Court in Danforth v. United States, supra, reversed the holding of the Circuit Court of Appeals for the Eighth Circuit that a landowner could not in a condemnation proceeding have the value as agreed in a purchase contract accepted as the value in a condemnation proceeding, but had to bring action on the contract under the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20), and this Court held that in such a situation the provisions of the condemnation act invoked by the Government controlled the proceeding and not the Tucker Act, and that under jurisdiction invoked by the United States, the procedure provided by the statute on condemnation must govern, and that the condemnation action was not a suit on a contract.

(3) Whether in this condemnation proceeding instituted by the United States pursuant to the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a (where the purchase price of the land was fixed by a now admittedly valid and binding

option contract between the landowner and the United States and where the United States, after a delay of almost four years in paying a portion of the amount of the contract price into the registry of the District Court, moved that Court to fix the compensation of the landowner at such contract price), the decision of the Circuit Court of Appeals that the landowner was not entitled to interest upon the portion of the award not paid into the registry of the District Court at the time of taking for the reason that the allowance of interest would be tantamount to awarding damages against the United States for the delay in the payment of an obligation, is not in conflict with the applicable decisions of this Court in Jacobs v. United States, 290 U. S. 13; United States v. Rogers, 255 U. S. 163, and other condemnation cases holding that just compensation guaranteed by the Fifth Amendment of the Constitution includes not only the fair market value of the property at the time of taking but also includes additional compensation for the loss of the use of the land or its money equivalent.

(4) Whether a landowner can be deprived of interest as provided by the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, where the United States instituted condemnation proceedings pursuant to that Act, acquired title to the land pursuant to that Act but withheld a portion of an agreed purchase price fixed by an admittedly valid and binding contract from June 16, 1941 to May 17, 1945, at which date the United States paid into the registry of the District Court the balance of the value as fixed by the contract, after having, on April 6, 1945, moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at the option contract price, on the ground that the landowner by successfully defending the option contract converted the adversary condemnation proceedings into an action on contract.

STATUTES AND CONSTITUTION INVOLVED.

The Constitutional Amendment involved is the Fifth Amendment to the Constitution of the United States, the pertinent part of which is:

> "No person shall be * * * deprived of life, liberty, or property without due process at ~~law; nor~~ shall private property be taken for public use, without just compensation."

The statutes involved are the Declaration of Taking Act, Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421, 40 U. S. C. A., Sec. 258 (a), and the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20).

The pertinent portion of the Declaration of Taking Act, 40 U. S. C. A., Sec. 258 (a), is as follows:

> "Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."

The pertinent portion of the Tucker Act, 28 U. S. C. A., Sec. 41 (20), is as follows:

> "Sec. 41. The district courts shall have original jurisdiction as follows:
>
> * * * * * * *
>
> "(20) Suits against United States concurrent with the court of claims, of all claims not exceeding $10,000 founded upon the constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in court of law, equity or admiralty, if the United States were suable. * * *"

STATEMENT.

The United States of America, the Respondent herein, instituted proceedings by filing in the District Court of the United States for the Eastern District of Missouri a Declaration of Taking (R. 137) and a Petition in Condemnation (R. 129) pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258 (a), to condemn certain land owned by petitioner.

Prior to the filing of the petition in condemnation certain transactions had transpired between the parties. On or about November 30, 1940, the petitioner and his wife granted the United States of America an option to purchase for the sum of $34,000.00 the real estate (including improvements) described in the petition in condemnation filed by the United States and on December 6, 1940, the United States by its duly authorized official, Col. R. D. Valliant, accepted said option (R. 151). This contract provided that the Government should have the right of immediate occupancy and use of the land for any purpose

from and after the acceptance by the Government of the option (R. 150-1).

The contract also provided that the landowners would deliver a general warranty deed conveying the fee simple title to the United States and that upon the furnishing of final certificate of title showing title to be vested in the United States, the Government would then pay the "agreed purchase price" to the landowners. It was further provided that (R. 151):

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

Pursuant to the terms of this agreement, Edward J. and Emma Linnenbringer executed and delivered to the United States a warranty deed dated January 9, 1941, acknowledged by the grantors on January 13, 1941, whereby the real estate described in the petition in condemnation was conveyed to the United States (R. 151). The said deed was accepted by the United States and on the 7th day of February, 1941, it was filed for record in the Recorder's office of St. Charles County, Missouri, and was recorded in said office in book 197, page 177 (R. 151).

The Government took possession of the said real estate described in the petition in condemnation on or about January 13, 1941 (R. 151), and has since that time been continuously in possession of said real estate.

The United States thereafter repudiated said contract and commenced this adversary condemnation proceeding. On June 16, 1941 a "Declaration of Taking" (R. 137) was filed, signed by Henry L. Stimson, Secretary of War of the United States, in the District Court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, Sec. 307, 40 U. S. C., Sec. 258a, and other condemnation statutes. The "Declaration of Taking" (R. 137) stated that the said lands (being the same land which the Government had taken possession of on or about January 13, 1941 pursuant to the purchase contract) were required for immediate use to provide a site of the Weldon Springs Ordnance Plant, that the estimated "just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto" was $16,000, which sum was deposited in the Registry of the District Court (R. 143). Then on June 18, 1941, the United States of America filed a "Petition in Condemnation" (R. 129) in the District Court in which it prayed, inter alia, that "The court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners," that the "court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable," that "the court, upon the filing of this petition, will make an order pursuant to the Act of Congress approved February 23, 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands."

Also on June 18, 1941, the District Court entered an "Order and Judgment on Declaration of Taking" (R. 140), wherein it was ordered that title to said lands in fee simple absolute vest in the United States of America. The Order also provided that "the right to just compensation for

the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law."

On July 23, 1941, Edward J. Linnenbringer and his wife, Emma Linnenbringer, filed an answer (R. 143) to the petition in condemnation in which they alleged, inter alia, that the Government had accepted the option to purchase said land for the price and sum of $34,000.00; that pursuant to said contract they executed and delivered a warranty deed which was accepted by the Government and filed for record in the Recorder's office of St. Charles County, Missouri, book 197, page 177, and that pursuant to said contract the Government took possession of said land on or about January 13, 1941. It was also alleged that the United States of America was estopped by reason of the facts alleged to claim it was entitled to the appointment of commissioners and that it was estopped to proceed in the condemnation proceedings except in accordance with the contract. They also prayed that judgment be entered for $34,000.00, with interest from January 13, 1941, the date of possession, at the rate of 6 per cent per annum. Pending the litigation, Emma Linnenbringer died, and petitioner became the sole owner.

Then almost four years after the filing of the petition in condemnation, and after the decision in Muschany v. United States, 324 U. S. 49, on April 6, 1945, the Government filed a motion (R. 155) in which it moved "the court to enter judgment in this cause for condemnation of said real estate, fixing the compensation to be paid by the plaintiff to defendants in the sum of $34,000.00." In the motion the Government stated that the sum of $34,000.00 was "The amount of compensation fixed in said option contract" and that "the United States Supreme Court in the case of Muschany v. United States, 89 L. Ed., Adv. Op.

492 (1945), has held an option contract to be valid and binding, which option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation."

Petitioner, Edward J. Linnenbringer, answered (R. 156) said motion and alleged, inter alia, that he (Emma Linnenbringer, his wife, having died) was "entitled to judgment in the said cause for the sum of $34,000.00 with interest on said sum at 6% per annum from the 13th day of January, 1941 to June 18, 1941, and interest on the sum of $34,000.00 less the sum of $16,000.00 deposited in the registry of this court on June 18, 1941, to-wit, the sum of $18,000.00 at 6% per annum from June 18, 1941 to date said entire sum is paid to this defendant."

RULINGS OF COURTS BELOW.

The District Court entered its opinion (R. 162) on June 8, 1945, and entered its findings and judgment (R. 180) on July 2, 1945 awarding the petitioner the sum of $34,000.00 as the price of the land along with $4,230.00, being the amount of interest at the rate of 6% per annum, which the Court held due the petitioner under the Declaration of Taking Act on $18,000.00 from June 18, 1941, the date of the deposit of $16,000.00, to May 17, 1945, the date when the $18,000.00 was deposited in the Registry of the Court. The $18,000.00 was the difference between $34,000.00, the price of the land fixed in the contract, and the $16,000.00 which was deposited in the Registry of the District Court as the estimated just compensation. Petitioner had sought interest from the date of actual taking of possession on January 13, 1941, but the Distrist Court ruled against that contention and held that interest should run from the filing of the Declaration of Taking and since the petitioner did not appeal from that holding he is bound by that portion of the findings and judgment.

On April 9, 1946, the Circuit Court of Appeals for the Eighth Circuit entered its judgment (R. 305) reversing the judgment of the District Court. In the opinion in this cause, the Circuit Court of Appeals referred to and adopted an opinion filed by it the same day in the case of Oliver v. United States (No. 13154 in the Circuit Court of Appeals). Petition for Certiorari in Oliver v. United States is being filed at the same time as this petition is being filed.

In that opinion (R. 296) the Circuit Court of Appeals held that the contract did not provide for the payment of interest, that the purchase price provided was "not merely the agreed fair value of the land" but "may be fairly regarded, at the very least, as the agreed equivalent of just compensation for the taking of land by condemnation or by purchase" (R. 302). It was held that: "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract" (R. 302). The Court further held that "in the absence of a statute or an express contract providing for it, interest cannot be added to an obligation of the United States," and that the allowance of interest upon the price "would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation, * * * interest does not run upon claims against the government even though there has been a default in the payment of the principal,' Smyth v. United States, 302 U. S. 329, 353" (R. 303).

The Circuit Court of Appeals further stated (R. 303) that it thought United States v. Baugh (C. C. A. 5th), 149 F. 2d 190, "may be distinguished * * * on the ground that the contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of a condemnation then proceeding," but that: "If, however, this distinction is not warranted, we are unable to follow the decision of the Baugh case."

REASONS FOR GRANTING PETITION.

(1) The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190. The Circuit Court of Appeals here held that the petitioner landowner could not, as a part of just compensation, receive interest on $18,000, being the difference between the agreed purchase price ($34,000) of the land (fixed in an admittedly valid and binding contract and for which amount the Government moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at said agreed purchase price) and the amount deposited ($16,000) by the United States in the registry of the District Court as estimated just compensation pursuant to condemnation proceedings instituted under the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, even though there was a delay of almost four years in the payment of the said $18,000 into the registry of the District Court. The Circuit Court of Appeals endeavored to distinguish United States v. Baugh, 149 F. (2d) 190, where the Fifth Circuit allowed interest where the delay was seven months and where the contract between the Government and the landowner fixed the "just compensation", on the ground that the "contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of condemnation then proceeding" but this Circuit Court of Appeals admitted that: "If, however, this distinction is not warranted we are unable to follow the decision in the Baugh case".

(2) The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271, where this Court held

that in a condemnation proceeding instituted by the United States where the landowner sought compensation fixed in a contract between the Government and the landowner that the jurisdiction of the Court and the procedure was governed by the condemnation statute invoked by the Government and not by the Tucker Act, Judicial Code §24 (40), 28 U. S. C. A., §41 (20), and that the action was not one on a claim against the United States. The Circuit Court of Appeals in the instant condemnation proceedings, instituted and maintained by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, held that the landowner could not recover constitutional and statutory interest provided in that Act because the landowner sought an award of the valuation fixed in the contract between the Government and the landowner and that interest could not be allowed upon a claim against the Government.

(3) The decision of the Circuit Court of Appeals is probably in conflict with the decisions of this Court in Jacobs v. United States, 290 US 13, United States v. Rogers, 255 US 163, and other condemnation cases in which this Court has laid down the principle that just compensation guaranteed by the Fifth Amendment of the Constitution includes not only the fair market value of the property at the time of taking but also includes additional compensation, measured in interest, for the loss of the use of the land or its money equivalent. The Circuit Court of Appeals in the instant condemnation proceedings instituted by the United States pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, where there was a delay of almost four years in paying the landowner a portion of an agreed purchase price fixed in a valid and binding contract, held that the landowner could not recover interest on the amount withheld because the adversary condemnation proceedings had been con-

verted into an action on contract by reason of the landowner's seeking compensation of an award for the contract price and that the awarding of interest would be tantamount to awarding damages against the United States for the delay in the payment of an obligation.

(4) The question involved in this case is an important question of Federal law which has not been, but should be, decided by this Court. The Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a, provides that in proceedings instituted pursuant to its terms the landowner shall be awarded, as a part of just compensation, interest on the amount finally awarded as the value of the property from the date of taking to the date of payment except that interest shall not be awarded of so much thereof as shall have been paid into the Court. In the instant case the United States instituted condemnation proceedings pursuant to that Act, acquired title pursuant to that Act, but withheld a portion of an agreed purchase price fixed by an admittedly valid and binding contract from June 18, 1941 to May 17, 1945, at which date the balance was paid into the District Court. The landowner was denied interest as provided by the Declaration of Taking Act on the ground that since the price of the land was fixed by contract the action was converted into one on contract. This Court has not directly decided whether or not the fact that the value of the land is fixed by a valid and binding contract, instead of by commissioners, renders inapplicable the provisions of the Declaration of Taking Act requiring the payment of interest. This question is far reaching in its application and importance because during and preceding the past war the United States acquired vast areas of land by means of such option contracts and the present decision leaves in confusion the proper application of the Declaration of Taking Act.

CONCLUSION

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Court of Appeals for the Eighth Circuit be reviewed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 194..

EDWARD J. LINNENBRINGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

OPINIONS OF THE COURTS BELOW.

The opinion (R. 162) of the United States District Court for the Eastern District of Missouri is reported in 61 F. Supp. 199. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in Oliver v. United States, which opinion was referred to and adopted as the opinion in this case, has not yet been reported, but appears on pages 294 to 303 of the transcript of the record filed herewith.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered April 9, 1946 (R. 305). The Petition for Rehearing was denied April 30, 1946. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Ch. 229, Sec. 1, 28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347.

STATEMENT OF THE CASE.

For the sake of brevity, we refer to the preceding petition, pages 6 to 10, for statement.

ARGUMENT.

I.

There Is a Direct Conflict Between the Decision of the Circuit Court of Appeals in the Instant Case and the Decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190, on the Question of Allowance of Interest to a Landowner in a Condemnation Proceeding Where the Value of the Land Is Fixed by Contract.

The Circuit Court of Appeals endeavored to distinguish the decision of the Circuit Court of Appeals for the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190, "on the ground that the contract there involved was interpreted by the court as fixing only fair value of the land for the purpose of a condemnation then proceeding" (R. 303). The Circuit Court of Appeals evidently recognized that this distinction was not a valid one because it went on to say: **"If, however, this distinction is not warranted, we are unable to follow the decision in the Baugh case."** (Emphasis supplied here, and throughout this brief, unless otherwise specified.)

In United States v. Baugh, supra, the United States commenced condemnation proceedings under the Second War Powers Act, 50 U. S. C. A., appendix, Sec. 632, on August 24, 1942. Several months thereafter the owners of numerous parcels within the area entered into stipulations with the United States wherein the parties agreed upon certain sums as just compensation for the taking of their property. The various stipulations provided and agreed that the court was "authorized and petitioned to enter * * * final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any

declaration of taking which may hereafter be filed by the plaintiff, vesting the title to the above-described property in the United States of America, and adjudging **just compensation** for the lands taken to be the sum of * * *." The Government had taken possession of each tract of land slightly more than a year before any compensation was made available, and there was a delay of seven months after entering into the contract until the money was paid into the Court. The District Court allowed interest from the date of the stipulations to the date the money was deposited in the Court. The United States' only specification of error was that the allowance of interest "on the sums agreed upon by the parties as just compensation violates the terms of the agreements and the rule that interest does not run on contractual claims against the sovereign." The Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the District Court said at l. c. 192-193:

> "In the present case the Government did not take a deed from the landowner as in an outright purchase, but it acquired title and possession by condemnation. **The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation** and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights. Under the decisions cited above, the land-

owners had the constitutional right to receive not only just compensation but, where the taking precedes the payment, the landowner is also entitled to 'such addition as will produce the full equivalent of that value paid contemporaneously with the taking,' which additional value may be measured by the legal rate of interest, if reasonable, in the state where the property is located * * *.

* * * * * * *

"The landowners apparently were willing at the date of the agreements to accept the sums of money stipulated without past interest and expected the Government to make prompt payment of the amount agreed upon. But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. **Their right to have interest is found in the Constitution and is neither found nor lost in the contract.**

"The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

It should be noted that the stipulation involved in United States v. Baugh, supra, specifically designated the agreed sum as "just compensation." It provided that the court be authorized to enter final judgment "adjudging **just compensation** for the lands taken, to be the sum of * * *." The contract in the instant case did not fix, or endeavor to fix, "just compensation." At all times, the contract here involved (R. 149-151) fixed only the "**purchase price**" or "**agreed valuation**" of the land. This contract provided that the Government would pay the "agreed purchase price" to the landowner upon the furnishing of a certificate of title. The contract further provided:

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the ward at the **agreed valuation** * * * and will upon filing its petition in such proceedings deposit said agreed **purchase price** * * *."

The attempted distinction of United States v. Baugh, supra, by the Circuit Court of Appeals below becomes meaningless, and is clearly **not warranted**, when the express language of the option here involved, referring to the amount as the "agreed valuation" and "agreed purchase price" is read and compared with the language used in the stipulation and by the court in United States v. Baugh, which refers to the amount there involved as "just compensation."

The conflict between the decisions of the two Circuit Courts of Appeal is further revealed by the totally diverse interpretation given by each of the Courts to the fact that neither the stipulation nor option-contract contained express provisions for the payment of interest. In the instant case the Circuit Court of Appeals stated (R. 302):

"There is no provision in the contract for the payment of interest on the stipulated consideration, nor does the contract fix a time within which payment is required. * * * The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States. The purchase price stipulated in the contract may be fairly **regarded**, at the very least, as the agreed equivalent of just compensation for the taking of the land by condemnation or by purchase."

The interpretation given by the Fifth Circuit in United States v. Baugh, supra, on precisely the same question is diametrically opposed and in direct conflict with that of the Eighth Circuit in the instant case. This is clear from the following language in that case (l. c. 192-193):

> "There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights. * * * The landowners apparently were willing at the date of the agreements to accept the sums of money stipulated without past interest and expected the Government to make prompt payment of the amount agreed upon. But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract.
>
> "The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

The Circuit Court of Appeals in the instant case was not willing to go so far as to say that the agreed purchase price, without interest, **actually** was just compensation. It said that such agreed purchase price "may be fairly regarded" as the equivalent of just compensation. In this way it indicates that it considers the landowner to have impliedly waived the constitutional right to interest as

well as its right to interest under the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. The Fifth Circuit, on the other hand, (where the stipulation specifically designated the price as "just compensation" as contrasted with the contract here referring to it as the "agreed purchase price" or "agreed valuation") stated that there was no reason to conclude that the landowner "**impliedly** waived any legal right" and that "their right to have interest is found in the constitution and is neither found nor lost in the contract."

It is submitted that there is a direct, irreconciliable conflict between the decision of the Circuit Court of Appeals in the instant case and the decision of the Circuit Court of Appeals from the Fifth Circuit in United States v. Baugh, 149 F. (2d) 190, and that this Court should grant certiorari.

II.

The Holding of the Circuit Court of Appeals That the Landowner "Converted the Condemnation Proceedings from an Ordinary Adversary Proceeding Into One Controlled, as to the Amount of Their Recovery, by the Terms of the Purchase Contract" Is in Conflict With the Decision of This Court in United States v. Danforth, 308 U. S. 271, Holding That the Fact That a Landowner in a Condemnation Proceeding Sought Recovery in the Amount of the Value of the Land Fixed by Contract Did Not Constitute a Suit Against the Government Within the Terms of the Tucker Act, 28 U. S. C. A., Sec. 41 (20).

The Circuit Court of Appeals held that the landowner by insisting upon the validity of the purchase contract "converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase

contract" (R. 302). From this that Court drew the conclusion (R. 302-303) that in the absence of a statute or an express contract providing for it, interest could not be added to such an obligation of the United States.

This holding is in direct conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271. In the Danforth case the United States and Danforth, the landowner, entered into a contract whereby the United States agreed to pay a designated amount for a perpetual flowage easement over the landowner's land. Later the United States came to the conclusion that the contract price was in excess of the actual value so it repudiated the contract and commenced condemnation proceedings pursuant to the provisions of the Mississippi River Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. S. C. A., Sec. 702a et seq. The landowner in both his answer and in a counterclaim pleaded the contract and prayed judgment for the contract price along with interest. The Circuit Court of Appeals for the Eighth Circuit in that case (Danforth v. United States, 102 F. [2d] 5), held that the landowner's contention was founded upon an attempt to enforce a contractual obligation of the United States, which is the same holding that Court made in the instant case. From that holding the Circuit Court of Appeals in that case further concluded that the District Court did not have jurisdiction to consider the landowner's claim because the amount involved exceeded the jurisdictional amount of such claims which could be brought in the District Court by virtue of the provisions of the Tucker Act, Section 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

The Circuit Court of Appeals there gave two reasons for this conclusion, (1) that the United States was asserting a privilege inherent solely by virtue of sovereign power and not as a private suitor, and thus in no way waived immunity from suit, and (2) the landowner was clearly attempting to enforce a contract.

This Court, in Danforth v. United States, 308 U. S. 271, could not agree with that interpretation. It said, l. c. 282-283:

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. Paragraph 3 of the letter shows condemnation was in mind.
>
> "This action is brought under the provisions of Sec. 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act on the general statute on condemnation. We have no doubt that the authority to purchase given the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title."

In the Danforth case the Government invoked the Flood Control Act, supra, and it was held that that Act determined the jurisdiction of the Court—that the cause was therefore not an action on contract. In the instant case, a different condemnation Act was invoked by the United States; but by the same reasoning, this is not an action on contract and was not so converted by the landowner in standing on the purchase contract. Instead, this proceeding is governed by the terms of the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. That Act provides for the payment of interest on so much of the just compensation as is not deposited into Court from the date of taking to the date of payment. The Flood Control Act involved in the Danforth case has no such provision for taking possession, and possession was not taken prior to payment of the money. Consequently this Court in the Danforth case found there was no interest due, be-

cause possession not taken. This Court there pointed out, "Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statutes takes place upon the payment of the money award by the condemnor." It should definitely be observed that this Court there said, "The Congress in other situations, has adopted the time of taking as the date for determination of value" and cited the Declaration of Taking Act as an example of this situation (l. c. 283-284).

Thus, it is clear, under the holding of this Court in the Danforth case, that the Declaration of Taking Act, being the Act invoked by the Government, controls the instant case as to the requirement of determining just compensation at the time of taking and the payment of interest on the amount withheld from the landowner from the time of taking to the date of payment. The Declaration of Taking Act specifically requires the payment of interest "on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment." Here the Government took actual possession on or about January 13, 1941. The deposit of $16,000, as estimated just compensation, was made on June 18, 1941. But it was not until May 17, 1945, that the Government deposited the remaining $18,000 in the registry of the District Court. There can be no question that upon the filing of the declaration of taking and the depositing of the estimated just compensation, the title was so irrevocably vested in the Government that the Government could not abandon the proceedings. The Circuit Court of Appeals for the Seventh Circuit said in United States v. Sunset Cemetery Co., 132 F. (2d) 163, 164:

> "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Gov-

> ernment by the mere filing of a declaration of taking and a judgment adjudging title in the United States is wholly unnecessary. Such is the statutory mandate. It follows that from and after the vesting of title, the Government can be divested only by virtue of appropriate congressional authorization and not by an amended taking * * * Consequently the proceeding may not be subsequently abandoned so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money."

Under the ruling of this Court in the Danforth case, the instant case clearly presents the following situation: The United States commenced these proceedings under the Declaration of Taking Act. Under that Act the value of the land could be fixed by a purchase contract and the landowner by standing on the purchase contract was not maintaining a suit on a contract so as to oust the District Court of jurisdiction by virtue of the Tucker Act, supra. The Declaration of Taking Act, not the Tucker Act, controlled the jurisdiction of the District Court. The Declaration of Taking Act requires the payment of interest from the date of taking to the date of payment on so much of the final award as was not made available to the landowner. The holding of the Circuit Court of Appeals, especially in holding that the landowner converted the action from a condemnation proceeding into an action on contract, is in direct conflict with the decision of this Court in Danforth v. United States.

If this cause had been converted into a suit on contract, the District Court would not have had jurisdiction under the terms of the Tucker Act because the amount involved is in excess of $10,000. This requirement as to amount is jurisdictional and one upon which the courts, on their own motion, must insist. Hammond-Knowlton v. United States, 121 F. (2d) 192, 202, cert. denied 314 U. S. 694. The Cir-

cuit Court of Appeals recognized that the Tucker Act was not applicable because, even though it held the action to be controlled by contract rather than the condemnation statute invoked, it nevertheless sustained the jurisdiction of the District Court by reversing the instant case and affirming Oliver v. United States, supra.

The observation of this Court in United States v. North American Transp. & Trading Co., 253 U. S. 330, should be noted. There, on the facts, interest was denied, but this Court said that interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the Government institut s in order to secure title to land." The instant case is such an adversary condemnation proceeding brought by the Government pursuant to the Declaration of Taking Act in which the owner is the defendant. A necessary step in such a condemnation proceeding is the determination of the value of the land at the time of the taking and the determination of the just compensation due the landowner, including interest, where there has been a denial of the use of the land and its money equivalent. This is an integral part of the condemnation proceeding. Here the Government itself moved the District Court to fix the landowner's compensation at the value fixed in the contract. The interest required to render just compensation was operative by the statute invoked by the Government. The whole process of condemnation, including that of fixing just compensation, is one continuous integrated process of litigation. Hopkins v. McClure, 148 F. (2d) 67, 70.

Indeed, where the Government has instituted condemnation proceedings the District Court then has exclusive jurisdiction over all matters involved in the condemnation

proceedings and the Court of Claims will not take jurisdiction of a suit in which the landowner seeks judgment on a claim allegedly arising out of the taking of the property involved in the condemnation proceedings. Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. In that case the United States instituted condemnation proceedings pursuant to specified condemnation statutes and (after the condemnation proceedings were instituted, declaration of taking filed along with estimated just compensation and the order vesting title in the United States was entered) the owners of leasehold interests filed suit in the Court of Claims for damages incident to the condemnation. The Court of Claims refused to take jurisdiction of the suit filed there on the ground that the District Court had exclusive jurisdiction, it said:

> "Under these acts the only court in which condemnation proceedings could have been brought was in the court in which they were brought, to-wit, the District Court for the District of New Jersey. That court has full jurisdiction to render a judgment for just compensation for the property taken, and to distribute the proceeds of that judgment among the various persons having an interest in that property in accordance with their respective interests. Plaintiffs in that suit can assert every right they have for just compensation for the taking of their interest in the property.
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> "Just compensation includes not only the value of the various interests taken, but also every other element which goes to make up just compensation. . . .
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> . . . . . .
>
> "It is not our function, however, to determine in this suit what damages plaintiffs are entitled to recover. They can recover only because they are a part of the just compensation required by the Constitution to be paid for the taking of their property for public use. Transportation Co. v. Chicago, 99 U. S. 635; Gibson v. United States, 166 U. S. 269; Josten Co. v.

Providence, supra; Mitchell v. United States, supra; Sharp v. United States, 191 U. S. 341; United States v. Grizzard, supra. By the Act of August 1, 1888, supra, jurisdiction to determine this question is vested exclusively in the District Court in which the condemnation proceedings are filed.

"This court has jurisdiction to award judgment for just compensation for property taken and damages incident to the taking only where the property has been taken without the institution of condemnation proceedings. Condemnation proceedings have been instituted in these cases. The court in which they were instituted has exclusive jurisdiction."

Once the Government repudiated the purchase contract, after it had taken possession of the land, and instituted the adversary condemnation proceedings, it could not abandon that proceeding. United States v. Sunset Cemetery Co. (C. C. A. 7th), 132 F. (2d) 163. The landowner could not bring, even if he had wanted to, action in the Court of Claims. Under the ruling of this Court in Danforth v. United States, supra, the landowner by standing on the contract in the condemnation proceedings did not convert the action into one on contract. The governing statute was the Declaration of Taking Act pursuant to which the Government instituted the proceedings and took title. The provisions of that Act require the payment of interest. Because of the conflict between the decision of the Circuit Court of Appeals in the instant case with the decision of this Court in Danforth v. United States, supra, it is submitted that a writ of certiorari should be granted.

III.

There Is a Probable Conflict Between the Decision of the Circuit Court of Appeals and the Applicable Decisions of This Court in Jacobs v. United States, 290 U. S. 13, United States v. Rogers, 255 U. S. 163, and Other Condemnation Cases Holding That a Landowner Should Receive in Addition to the Value of the Land at the Time of Taking an Additional Amount Sufficient to Produce the Full Equivalent of That Value Paid Contemporaneously With the Taking.

There can be no question but that the Fifth Amendment of the Constitution requires the Government in a condemnation proceeding to compensate the landowner not only for the value of the land at the time of taking, but also an additional amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. This Court has definitely established this principle in a considerable number of cases, and an examination of these cases reveals a conflict between the decisions of this Court and the decision of the Circuit Court of Appeals for the Eighth Circuit in the instant case.

In Jacobs v. United States, 290 U. S. 13, the United States constructed a dam which caused an increase in the occasional overflows of certain lands. The landowners and the Government were not able to reach a settlement, so the landowners brought separate suits under the Tucker Act, 28 U. S. C. A., Sec. 41 (20), to recover compensation for the property taken. The District Court found that the landowners were entitled to the amount of damage caused by the construction of the dam as of the date of its completion together with interest from the date of taking to the date of the entry of the judgment. The Circuit Court of Appeals reversed the District Court on

the ground that since the suits were not condemnation proceedings instituted by the Government, but were suits founded upon an implied contract, interest could not be allowed. This Court in reversing the Circuit Court of Appeals pointed out that the "remedy did not qualify the right" because the suits were founded upon the Constitution of the United States and summarized the applicable law as follows:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and **no specific command to include interest is necessary** when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306, 67 L. ed. 664, 669, 43 S. Ct. 354. That suit was brought by the owner under Sec. 10 of the Lever Act which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that **the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate.** See also United States v. Rogers, 255 U. S. 163, 169, 65 L. ed. 566, 568, 41 S. Ct. 281.
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> "The principle was restated in Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 611. There the suit was brought in the Court of Claims, and that court gave judgment for the value of the property as it was found to be at the time of the requisition. Plaintiffs insisted that they were entitled to an additional amount to produce the equivalent of the value of the property 'paid contemporaneously' and

that, for this purpose, interest as a reasonable measure should be allowed. This Court sustained the claim. **The Court held that judgment in 1926 for the value of the use of the property in 1918 or 1919, without more, was not sufficient to constitute just compensation; that the claim was not for 'interest' within the meaning of Sec. 177 of the Judicial Code** (U. S. C., Title 28, Sec. 284) **and that that provision did not preclude the recovery of the additional amount asked.** To the same effect are Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123, 68 L. ed. 934, 941, 44 S. Ct. 471; Liggett & M. Tobacco Co. v. United States, 274 U. S. 215, 71 L. ed. 1006, 47 S. Ct. 581."

In United States v. Rogers, 255 U. S. 163, the United States brought action on January 18, 1915 to condemn certain lands for reclamation purposes. The award of the Commission was filed February 3, 1915 and an order was entered July 27, 1915 by the District Court directing that the sums awarded be deposited and distributed for the benefit of the landowners. Subsequently, the owners made a motion for a supplemental order requiring the United States to deposit sums equal to 6% interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding and such an order was entered. This Court, in upholding the requirement of the payment of interest, said, at l. c. 568:

"Was there error in awarding the owners interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?

"It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. United States ex rel. Angarica v. Bayard, 127 U. S. 251, 260, 32 L. Ed. 159, 163, 8 Sup. Ct. Rep. 1156; United States v. North Carolina, 136 U. S. 211, 216, 34 L. Ed. 336, 338, 10 Sup. Ct. Rep. 920, cited and

approved in National Home v. Parrish, 229 U. S. 494, 496, 57 L. Ed. 1296, 1298, 33 Sup. Ct. Rep. 944. **In the present case the landowners did not sue upon a claim against the government,** as was the fact in United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. Ed. 935, 40 Sup. Ct. Rep. 518. **The government was seeking, for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.**

"Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property. Monongahela Nav. Co. v. United States, 148 U. S. 312, 341, 37 L. Ed. 463, 473, 13 Sup. Ct. Rep. 622." (Emphasis supplied.)

Application of the same principle is to be found in a number of other decisions by this Court. See: Phelps v. United States, 274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; Shoshone Tribe v. United States, 299 U. S. 476; Seaboard Air Line R. Co. v. United States, 261 U. S. 299; United States v. Klamath Indians, 304 U. S. 119.

Now the Circuit Court of Appeals below recognized the principle that a landowner is entitled to interest upon the fair value of the land from the date of the taking until payment, citing (R. 300) United States v. Rogers, supra, and Seaboard Air Line R. Co. v. United States, supra; but the Circuit Court of Appeals totally failed to apply that principle to the facts of the instant case.

There is only one conceivable factual difference between the instant case and the decisions by this Court cited above where this Court held that the Fifth Amendment required the payment of interest. Here the price or valuation of the land was fixed by contract at the time of the taking,

instead of being fixed by commissioners. While the Government repudiated the contract (R. 301) and instituted adversary condemnation proceedings, the fact is clear that it was the United States, on its own initiative before the District Court entered judgment, which moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at the contract price of $34,000.00, because this Court in Muschany v. United States, 324 U. S. 49, held such option contracts "valid and binding". It should also be noted that the United States voluntarily deposited the $18,000 in the Court (R. 160) even before the District Court ruled on its motion. The District Court did enter judgment (R. 180) directing the just compensation of the landowner to be $34,000.00 in accordance with the contract along with $4,230.00, being the amount of interest at the rate of 6% per annum as provided in the Declaration of Taking Act, on $18,000.00 from June 18, 1941, the date of the order and judgment on declaration of taking (R. 140), to May 17, 1945, the date the $18,000.00 was deposited in the registry of the Court.

There is no dispute that from June 18, 1941 to May 17, 1945 the landowner was deprived both of the use of the land and of a portion of its money equivalent. There is no dispute that the land was taken. The Circuit Court of Appeals held that no interest was allowable in the instant case because "the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled * * * by the terms of the purchase contract". The Court said (R. 302):

> "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceeding into one controlled, as to the amount of

their recovery, by the terms of the purchase contract. * * *

"The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, cannot justify the award of interest not required by the contract. In the absence of a statute or an express contract providing for it, interest cannot be added to an obligation of the United States. * * * The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in payment of an obligation. '* * * interest does not run upon claims against the Government even though there has been a default in the payment of principle.' Smyth v. United States, 302 U. S. 329, 353."

This contention that the nature of the proceedings was converted into an action in contract so as to avoid the requirements of the Fifth Amendment and the condemnation statutes has been presented to this Court before and this Court has rejected the contention.

We have already pointed out (Point II) that in Danforth v. United States, 308 U. S. 271, this Court held, in an action commenced under a condemnation statute where the landowner stood on a contract fixing the price of the land, that the jurisdiction of the Court depends upon the language of the condemnation statute involked by the condemnor and not upon the Tucker Act. While this Court held that by reason of the terms of the statute controlling that case there was no taking until the payment of the award and therefore no interest was due, this Court also pointed out and cited the Declaration of Taking Act as an example of where Congress has by statute defined the doing of a specific thing as the determination of taking from which interest runs. The instant case presents pre-

cisely such a situation under the Declaration of Taking Act and under the terms of that Act on the facts here presented the landowner is entitled to interest.

Even in a situation where the Government does not institute condemnation proceedings and the landowner is forced to resort to the Tucker Act, this Court has held that interest is included in the right to just compensation. This was the situation in Jacobs v. United States, 290 U. S. 13, where the Circuit Court of Appeals on authority of United States v. North American Transp. & Trading Co., 253 U. S. 330, held that the suit was on implied contract and interest was not allowable. This Court reversed and held that the North American Transp. & Trading Co. case was not applicable because it was not founded upon the Fifth Amendment and that instead in suits founded on the Fifth Amendment the landowner "is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount to be added' ".

Nor does the fact, as contended by the Circuit Court of Appeals, that the contract did not specifically provide for interest defeat the right to interest. In the Jacobs case, supra, this Court said, 290 U. S. 13, 16-17:

> "The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary * * *' the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate."

Moreover, since the condemnation statute invoked by the United States, which in this case was the Declaration

of Taking Act, controls the jurisdiction of the Court, Danforth v. United States, supra, and since the Declaration of Taking Act specifically provides for interest, there is a clear statutory requirement of interest. This was entirely ignored by the Circuit Court of Appeals.

It should be observed that the reason assigned by the Circuit Court of Appeals as to why the adversary condemnation proceedings were "converted" into an action on contract is not an accurate statement of fact. The Circuit Court of Appeals stated (R. 302) that the landowners: "By their successful defense of the validity of the purchase contract" converted the cause of action. The petitioner herein did neither more than allege in the answers to the petition in condemnation and the motion by the Government that the contract was valid and that the value was fixed by it (R. 143, 156). This is nothing more than the landowner did in Danforth v. United States, supra. This issue was not tried by the Government. It was the Government, after this Court had definitely settled the validity of such a contract in Muschany v. United States, 324 U. S. 49, who voluntarily moved (R. 154) the District Court that such option was valid and binding and that the District Court fix the just compensation at the agreed value. There was thus no dispute as to the validity and binding nature of the contract. Certainly under these circumstances it could not correctly be stated that there was a "successful defense". But, even if there had been a dispute which was litigated, the establishment of the price of the land at the time of the taking by the successful defense of an agreed valuation would still not constitute a conversion which would preclude the payment of interest. Danforth v. United States, supra.

Here, as in United States v. Baugh, 149 F. (2d) 190,

> "The stipulation merely had the effect of relieving the Government from having to make proof as to

what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Since the option contract fixing the agreed purchase price is valid and binding and since the landowner was deprived of the use of his land and a portion ($18,000.00) of his money equivalent from June 18, 1941 to May 17, 1945, it is submitted that the holding of the Circuit Court of Appeals that the landowner is not entitled to interest as a portion of just compensation is in direct conflict with the applicable decisions of this Court.

IV.

The Declaration of Taking Act Requires the Payment of Interest. This Court Has Not Directly Decided Whether or Not This Requirement Is Avoided Because the Value of the Land Is Fixed by Contract.

The United States instituted these proceedings pursuant to the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, and said Act requires the payment of interest on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment except that interest shall not be awarded on so much thereof as shall have been paid into the court.

This cause involves an important question of Federal Law which has not been, but should be, decided by this Court of whether the United States can invoke the Declaration of Taking Act, acquire title of land pursuant to that Act, withhold a portion of an agreed purchase price fixed by a valid and binding option contract and still deprive the landowner of interest which the Act provides shall be paid him.

The United States deposited in the District Court on June 18, 1941 the sum of $16,000 as the estimated just compensation (R. 182). By this act the United States repudiated an option contract theretofore entered into between it and the landowner whereby the agreed purchase price or valuation of the land was fixed at $34,000. Although the landowner had proceeded to perform its obligations under the contract and the United States had taken possession of the land pursuant to the contract, the United States did not take title to the land pursuant to the contract. This it could have easily done by either of two methods. If the United States was satisfied with the title delivered by the owner it could have accepted that title and compensated the landowner in the agreed amount. Or, if not satisfied with the title, the United States could have, as provided in the contract, commenced condemnation proceedings and deposited in the court the agreed amount of $34,000 and a consent verdict would be entered in said amount. The United States chose not to acquire land by either of these methods. Instead it repudiated (R. 301) the contract and commenced adversary condemnation proceedings. It acquired title to the land by virtue of the "Order and Judgment On Declaration of Taking" (R. 140), filed by the District Court on June 18, 1941. That order vested title to the land in fee simple absolute in the United States upon the filing of the Declaration of Taking and the depositing of the estimated compensation. The Order recited that the Petition and Declaration of Taking "state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition" (R. 140). The Court directed that "the amount of just compensation for said land involved in this con-

demnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law" (R. 142).

Having acquired title, the next question was the ascertainment of the valuation of the land as of the time of the taking. While the landowner by its answer brought this question to issue by alleging that the contract price of $34,000 determined the value of the land and the time of the taking from which he was entitled to interest, it was the United States itself that moved (R. 154) the District Court to the effect that the United States "had executed an option contract for the purchase * * * from the defendants the said real estate for the sum of $34,000.00, being the amount of compensation fixed in said option contract," and that said option was "valid and binding." It is significant that the United States moved the Court "to enter judgment in this cause for the **condemnation** of the said real estate, **fixing the compensation** to be paid by plaintiff to the defendants **in the sum of $34,000**" (R. 155).

Here the cause was at all times a condemnation proceeding and the condemnation statute invoked (the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a) expressly provides for the payment of interest. **Can the United States invoke such a statute, acquire title to land for public use under such statute, move for the fixing of the compensation at a specified contract price of $34,000 and then avoid payment of interest for a period of almost four years when the statute specifically requires the payment of interest?** If the United States is able to frustrate the very purpose of the statute, it will destroy the guarantee of just compensation found in the Fifth Amendment to the Constitution. This it can do, if the technique adopted by the government in this condemnation is followed, by simply obtaining contracts and taking possession, then waiting any length of time it desires before commencing condem-

nation proceedings in which it would move for entry of judgment at the contract price. The Constitutional right to just compensation should not be so ludicrously defeated.

The very purpose of the Declaration of Taking Act was to relieve the Government from the burden of interest while at the same time protecting the right of the landowner to just compensation, including interest. This Court said in United States v. Miller, 317 U. S. 369, 381:

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and **to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment** in the eminent domain proceeding. Second, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. **The Act recognizes that there may be an error in the estimate** and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, **the owner shall recover the excess with interest.**"

In the instant case there was a substantial error in the estimated just compensation, which the Circuit Court of Appeals assigned to "the mistaken belief that the contract was void" (R. 362), but it was the United States that moved the District Court that the option contract was "valid and binding." Obviously, the "agreed purchase price" or "agreed valuation", as the contract terms the $34,000, was the valuation as of the time the contract was entered into and the possession of the land acquired. "The just compensation Constitutionally required is not the same thing as the sale price of a capital asset." Kieselbach v. Commissioner of Internal Revenue, 317 U. S. 399. Moreover, the Declaration of Taking Act provides for the payment of interest in just such a situation where an error

has been made. The money deposited with the declaration of Taking is not accepted in full of the demand. As said by the Circuit Court of Appeals for the Fifth Circuit in Atlantic Coast Line R. Co. v. United States, 132 F. (2d) 959: "The money thus deposited is not offered or accepted as in full of the demand, but is without prejudice and only to escape liability for accruing interest." In the instant case the District Court properly ordered at the time the title was vested in the United States that the just compensation "shall be ascertained and awarded in said proceeding * * * pursuant to law" and it is submitted that the District Court properly applied the law established under the Fifth Amendment and by the Declaration of Taking Act.

When the United States repudiated the option contract and commenced action pursuant to the Declaration of Taking Act by filing the declaration of taking, the condemnation was then "effected and title completely vested in the Government by the mere filing of a declaration of taking." The Government could not subsequently abandon the proceeding "so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money." United States v. Sunset Cemetery Co. (CCA 7th), 132 F. (2d) 163. Nor could the landowner, after the Government invoked the exclusive jurisdiction of the District Court under the Declaration of Taking Act, bring a cause of action in the Court of Claims under the Tucker Act for any claims arising out of the condemnation. The Court of Claims would not have jurisdiction of such action. Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. It is thus seen that the only forum in which the landowner could stand on the option contract was in condemnation suit instituted by the United States and the terms of the condemnation act invoked by the Government control the jurisdiction of the court and the proceedings. Dan-

forth v. United States, 308 U. S. 271. This clearly raises the question of the application and meaning of the Declaration of Taking Act.

The Circuit Court of Appeals, instead of deciding the instant case as a condemnation proceeding held that it had been converted from such into an action on contract.

Having taken the position that the proceeding was one on contract the Circuit Court of Appeals stated:

> "The allowance of interest upon the consideration stipulated in the purchase contract would be **tantamount** to awarding interest against the United States by way of damages for delay in the payment of an obligation. '* * * interest does not seen upon claims against the Government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353."

The Circuit Court of Appeals has unquestionably confused the nature of these condemnation proceedings and the nature of a suit on an obligation of the United States. Smyth v. United States, 302 U. S. 329, was not concerned with a factual situation at all comparable with the facts here presented. The Circuit Court of Appeals recognized that the facts here involved do not actually present a situation where interest would constitute damages for delay in the payment of an obligation because it uses the word "tantamount"—which means that it is not the same, but is "equivalent in value." Moreover the Circuit Court of Appeals' reliance on the quoted sentence of Smyth v. United States, supra, leads it to ignore the repeated distinctions drawn by this Court between condemnation proceedings and other types of proceedings. Thus in United States v. North American Transp. & Trading Co., 253 U. S. 330 (cited and relied upon in Smyth v. United States, supra), a landowner brought a suit on an implied contract in the Court of Claims and sought inter-

est. This Court in holding that interest was not allowable on the facts in that case points out (l. c. 337) nevertheless that **interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land."** The facts of the instant condemnation case certainly bring it within the situation where interest is Constitutionally required and not within the situation where it is not allowable. This Court has repeatedly pointed out that United States v. North American Transp. & Trading Co., supra, was not a condemnation proceeding and that while interest was not allowed there, it is allowable in condemnation proceedings. Thus in Jacobs v. United States, this court in holding interest allowable said, 290 U. S. 13, 18:

> "The case of United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 S. Ct. 518, supra, cannot be regarded as establishing a different rule for the instant case. See Seaboard Air Line R. Co. v. United States, supra (261 U. S., p. 305, 676 L. ed. 669, 43 S. Ct. 354); Phelps v. United States, supra (274 U. S., pp. 343, 344, 71 L. ed. 1084, 1085, 47 S. Ct. 611). The North American Transp. & Trading Co. case rested upon its special facts. * * * The court said that the suit was not founded upon the Fifth Amendment. 253 U. S., pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point."

This Court has not decided the question of whether the express provisions of the Declaration of Taking Act requiring the payment of interest for delay in payment of a portion of the just compensation can be defeated simply

because the agreed purchase price or valuation of the land was fixed by an admittedly valid and binding option contract and which agreed purchase price the landowner pleaded as the value of the land at the time of the taking. In Danforth v. United States, 308 U. S. 271, this Court held that the provisions of the condemnation statute invoked by the Government controlled the jurisdiction of the Court rather than the terms of the Tucker Act where the landowner in his answer pleaded a comparable contract fixing the price of the land. While in that case it was held that under the provisions of the condemnation statute invoked and the facts presented no interest was allowable, this Court pointed out in dictum that Congress in the Declaration of Taking Act fixed the time of taking as the date for determination of value.

Since the United States instituted this suit pursuant to the Declaration of Taking Act, acquired title to the land under the terms of that Act and pursued the suit to its conclusion in the District Court under that Act and since the Circuit Court of Appeals failed and refused to affirm the judgment of the District Court allowing interest in accordance with the provisions of that Act and the Fifth Amendment of the Constitution, it is submitted that this cause presents an important Federal question which should be decided by this Court.

As we have indicated, we believe the reasoning of this Court in Danforth v. United States, supra, applies to the instant case so that the payment of interest is required by the terms of the Declaration of Taking Act. Since, however, that case did not directly involve the Declaration of Taking Act, we submit that the court should remove all doubt and directly decide the questions here presented under the Declaration of Taking Act.

During this past war and the period preceding it, the United States condemned large amounts of land to build defense and military facilities. Much of this land was

acquired by means of options or purchase contracts such as here used. Unless this Court settles the application of the Declaration of Taking Act to such options, there will be much confusion and litigation concerning the rights of landowners under such options and the Declaration of Taking Act.

CONCLUSION.

For the reasons stated, it is respectfully submitted that a writ of certiorari should be issued out of this Court to review the judgment entered herein by the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDWARD J. LINNENBRINGER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 149.

BRIEF OF PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

EDWARD J. LINNENBRINGER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 149.

BRIEF OF PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Edward J. Linnenbringer, petitioner herein, and respectfully files his brief herein.

OPINIONS OF THE COURTS BELOW.

The opinion (R. 162) of the District Court of the United States for the Eastern District of Missouri is reported at 61 F. Supp. 199. The memorandum opinion of the Circuit

Court of Appeals for the Eighth Circuit is reported at 155 F. (2d) 77, where it is stated that the decision of the instant case was ruled by the companion case of Oliver et al. v. United States, which is reported at 155 F. (2d) 73. (The opinion of the District Court in the Oliver case is reported at 69 F. Supp. 741.)

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered April 9, 1946 (R. 305), 155 F. (2d) 77. The Petition for Rehearing was denied April 30, 1946 (R. 341). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Ch. 229 (28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347). This Court granted the Petition for Writ of Certiorari on October 14, 1946.

CONSTITUTION AND STATUTES INVOLVED.

The constitutional amendment involved is the Fifth Amendment to the Constitution of the United States. The statutes involved are the Declaration of Taking Act, Feb. 26, 1931, c. 307, Sec. 1, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a, and the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20). The pertinent portions of the Fifth Amendment and these statutes are set forth in Appendix A.

STATEMENT.

The United States of America, the Respondent herein, instituted proceedings by filing in the District Court of the United States for the Eastern District of Missouri a Declaration of Taking (R. 137) and a Petition in Condemnation (R. 129) pursuant to the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258 (a), to condemn certain land owned by petitioner.

Prior to the filing of the petition in condemnation certain transactions had transpired between the parties. On or about November 30, 1940, the petitioner and his wife granted the United States of America an option (R. 149) to purchase for the sum of $34,000.00 the real estate (including improvements) described in the petition in condemnation filed by the United States. On December 6, 1940, the United States, by its duly authorized official, Col. R. D. Valliant, accepted said option (R. 151). This contract provided that the Government should have the right of immediate occupancy and use of the land for any purpose from and after the acceptance by the Government of the option (R. 150-1).

The contract also provided that the landowners would deliver a general warranty deed conveying the fee simple title to the United States and that upon the furnishing of final certificate of title showing title to be vested in the United States, the Government would then pay the "agreed purchase price" to the landowners. It was further provided that (R. 151):

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation

Phelps v. United States, 274 U. S. 341;
United States v. Miller, 317 U. S. 369;
United States v. 1997.66 Acres of Land, (C. C. A. 8th, 1943) 137, F. (2d) 8;
United States v. 0.45 Acres of Land, (C. C. A. 2d, 1945), 151 F. (2d) 114;
Catlin v. United States, 324 U. S. 229;
United States v. 26.3765 Acres of Land, (D. C. N. Y. 1945), 62 F. Supp. 910;
Lee v. United States (Ct. App. D. C., 1932), 58 F. (2d) 879;
Kieselbach v. Commissioner of Internal Revenue, 317 U. S. 399;
Atlantic Coast Line R. Co., v. United States, 132 F. (2d) 959;
United States v. Sunset Cemetery Co., (C. C. A. 7th. 1943), 132 F. (2d), 163;
Dominion Smelting & Refining Corp., of N. J., v. United States, 102 Ct. Cl. 281;
Danforth v. United States, 308 U. S. 271.

C. The fact that the value of the property in a condemnation proceeding is fixed by a valid purchase contract between the Government and the landowner does not affect or diminish the right of the landowner to interest. Such rights of the landowner are determined by the condemnation statute invoked by the Government.

Constitution of the United States, Fifth Amendment;
Lands Division, Department of Justice, 1 Federal Eminent Domain, Sec. 42;
Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A. Sec. 258a;
Muschany v. United States, 324 U. S. 49;
Danforth v. United States, 308 U. S. 271;
Tucker Act, Section 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20);
United States v. Sunset Cemetery Co., 132 F. (2d) 163;

Hammond-Knowlton v. United States, 121 F. (2d) 192, Cert. denied 314 U. S. 694;
United States v. North American Transp. & Trading Co., 253 U. S. 330;
Hopkins v. McClure, 148 F. (2d) 67;
Dominion Smelting & Refining Corp. of N. J., v. United States, 102 Ct. Cl. 281.

II.

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the landowner converted the adversary condemnation proceeding into a suit on contract and that therefore interest was not allowable as it would be tantamount to awarding interest against the United States by way of damages for delay in payment of an obligation, because:

A. Even where the purchase price or valuation of land is fixed by contract between the Government and the landowner, and the Government subsequently prosecutes an adversary condemnation proceeding under the Declaration of Taking Act but fails to deposit the full amount of the agreed price in the court, the landowner is entitled to interest on that portion of the value which was not deposited from the date of taking until the time it is finally paid:

Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A. 258 (a);
United States v. Baugh, 149 F. (2d) 190;
Holley v. United States (CCA 6th, 1942), 124 F. (2d) 909;
Jacobs v. United States, 290 U. S. 13.

B. The payment of "interest" in condemnation proceedings, where the taking of the property precedes payment, is not the awarding of damages for delay in payment of an

obligation of the United States. Instead, such "interest" is a portion of just compensation required by both the Declaration of Taking Act and the Fifth Amendment.

Marcus, Philip, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317;

Just, Carolyn, "Condemnation Procedure During World War II," 12 George Washington L. R. 286;

Attorney General of the United States, Annual Reports for the fiscal years ending June 30, 1939, 1940, 1941, 1942 and 1943;

"American Economic Mobilization," 55 Harv. L. R. 427;

Lands Division, Department of Justice, "Federal Eminent Domain," Sections 34-39, 42;

Muschany v. United States, 324 U. S. 49;

Danforth v. United States, 308 U. S. 271;

Constitution of the United States, Fifth Amendment;

Declaration of Taking Act, 46 Stat. 1421, ch. 307, 40 U. S. C. A., Sec. 258a;

Jacobs v. United States, 290 U. S. 13;

United States v. North American Transp. & Trading Co., 253 U. S. 330;

Seaboard Air Line R. Co. v. United States, 261 U. S. 299;

United States v. Baugh, 149 F. (2d) 190;

Smyth v. United States, 302 U. S. 329;

United States v. Rogers, 255 U. S. 163;

Shoshone Tribe v. United States, 299 U. S. 476;

Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20);

United States v. Lynah, 188 U. S. 445;

Phelps v. United States, 274 U. S. 341;

Holley v. United States, 124 F. (2d) 909;

United States v. McIntosh, 2 F. Supp. 244;

Thayer-West Point Hotel Co. v. United States, 64 F. Supp. 565.

ARGUMENT.

I.

The Fifth Amendment to the Constitution Requires the Government in a Condemnation Proceeding to Compensate the Landowner Not Only for the Value of the Land at the Time of Taking, But Where the Taking Precedes Payment the Government Must, in Addition to the Value at the Time of Taking, Pay the Landowner an Amount Sufficient to Produce the Full Equivalent of That Value Paid Contemporaneously With the Taking. Interest at a Proper Rate Is a Good Measure by Which to Ascertain the Additional Amount Which Must Be Paid to the Landowner.

It has long been the rule in this country that when the landowner is not paid the value of the land taken under the power of eminent domain at the time of the taking he must be compensated with an additional amount in order that he will receive just compensation. Thus, it was graphically said in the early case of Parks v. Boston, 15 Pick. (32 Mass.) 198, 208 (1834):

> "The rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court would be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other; and this rule is departed from only because some time is necessary, by the terms of law, to conduct the inquiry, and this delay must be compensated by interest."

This Court has consistently recognized that the payment of interest constitutes a part of just compensation re-

quired by the Fifth Amendment whenever the taking preceded the payment of the fair value of the land determined as of the time of the taking.

In Jacobs v. United States, 290 U. S. 13, the United States constructed a dam which caused an increase in the occasional overflows of certain lands. The landowners and the Government were not able to reach a settlement, so the landowners brought separate suits under the Tucker Act, Judicial Code, Sec. 24 (20), 28 U. S. C. A., Sec. 41 (20), to recover compensation for the property taken. The District Court found that the landowners were entitled to the amount of damage caused by the construction of the dam as of the date of its completion, together with interest from the date of taking to the date of the entry of the judgment. The Circuit Court of Appeals reversed the District Court on the ground that since the suits were not condemnation proceedings instituted by the Government, but were suits founded upon an implied contract, interest could not be allowed. This Court, in reversing the Circuit Court of Appeals, pointed out that the "remedy did not qualify the right," because the suits were founded upon the Constitution of the United States and summarized the applicable law as follows:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and **no specific command to include interest is necessary** when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306, 67 L. ed. 664, 669, 43 S. Ct. 354. That suit was brought by

the owner under Sec. 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that **the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate.** See also United States v. Rogers, 255 U. S. 163, 169, 65 L. ed. 556, 568, 41 S. Ct. 281.

"The principle was restated in Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083, 47 S. Ct. 611. There the suit was brought in the Court of Claims, and that court gave judgment for the value of the property as it was found to be at the time of the requisition. Plaintiffs insisted that they were entitled to an additional amount to produce the equivalent of the value of the property 'paid contemporaneously' and that, for this purpose, interest as a reasonable measure should be allowed. This Court sustained the claim. **The Court held that judgment in 1926 for the value of the use of the property in 1918 or 1919, without more, was not sufficient to constitute just compensation that the claim was not for 'interest' within the meaning of Sec. 177 of the Judicial Code** (U. S. C., Title 28, Sec. 284), **and that that provision did not preclude the recovery of the additional amount asked.** To the same effect are Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123, 68 L. ed. 934, 941, 44 S. Ct. 471; Liggett & M. Tobacco Co. v. United States, 274 U. S. 215, 71 L. ed. 1006, 47 S. Ct. 581." (Emphasis supplied here, and throughout this brief, unless otherwise specified.)

In United States v. Rogers, 255 U. S. 163, the United States brought action on January 18, 1915, to condemn certain lands for reclamation purposes. The award of the Commission was filed February 3, 1915, and an order was entered July 27, 1915, by the District Court directing that the sums awarded be deposited and distributed for the benefit of the landowners. Subsequently, the owners made

and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

Pursuant to the terms of this agreement, Edward J. and Emma Linnenbringer executed and delivered to the United States a warranty deed dated January 9, 1941, acknowledged by the grantors on January 13, 1941, whereby the real estate described in the petition in condemnation was conveyed to the United States (R. 151). The said deed was accepted by the United States and on the 7th day of February, 1941, it was filed for record in the Recorder's office of St. Charles County, Missouri, and was recorded in said office in book 197, page 177 (R. 151).

The Government took possession of the said real estate described in the petition in condemnation on or about January 13, 1941 (R. 151), and has since that time been continuously in possession of said real estate.

The United States thereafter repudiated said contract and commenced this adversary condemnation proceeding. On June 16, 1941, a "Declaration of Taking" (R. 137) was filed, signed by Henry L. Stimson, Secretary of War of the United States, in the District Court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, Sec. 307, 40 U. S. C., Sec. 258a, and other condemnation statutes. The "Declaration of Taking" (R. 137) stated that the said lands (being the same land which the Government had taken possession of on or about January 13, 1941, pursuant to the purchase contract) were required for immediate use to provide a site of the Weldon Spring Ordnance Plant, that the estimated "just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto"

was $16,000, which sum was deposited in the Registry of the District Court (R. 143). Then on June 18, 1941, the United States of America filed a "Petition in Condemnation" (R. 129) in the District Court in which it prayed, inter alia, that "The court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners," that the "court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable," that "the court, upon the filing of this petition, will make an order pursuant to the Act of Congress approved February 23, 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of the lands."

Also on June 18, 1941, the District Court entered an "Order and Judgment on Declaration of Taking" (R. 140), wherein it was ordered that title to said lands in fee simple absolute vest in the United States of America. The Order also provided that "the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law."

On July 23, 1941, Edward J. Linnenbringer and his wife Emma Linnenbringer, filed an answer (R. 143) to the petition in condemnation in which they alleged, inter alia, that the Government had accepted the option to purchase said land for the price and sum of $34,000.00; that pursuant to such contract they executed and delivered a warranty deed which was accepted by the Government and filed for record in the Recorder's Office of St. Charles County, Missouri, book 197, page 177, and that pursuant

to said contract the Government took possession of said land on or about January 13, 1941. It was also alleged that the United States of America was estopped by reason of the facts alleged to claim it was entitled to the appointment of commissioners and that it was estopped to proceed in the condemnation proceedings except in accordance with the contract. They also prayed that judgment be entered for $34,000.00, with interest from January 13, 1941, the date of possession, at the rate of 6 per cent per annum. Pending the litigation, Emma Linnenbringer died (R. 157), and petitioner became the sole owner.

Then almost four years after the filing of the petition in condemnation, and after the decision in Muschany v. United States, 324 U. S. 49, on April 6, 1945, the Government filed a motion entitled "Motion for Judgment for Plaintiff in Condemnation and for Defendants Fixing Compensation by Option," (R. 155) in which it moved "the court to enter judgment in this cause for condemnation of said real estate, fixing the compensation to be paid by the plaintiff to defendants in the sum of $34,000.00." In the motion the Government stated that the sum of $34,000.00 was "The amount of compensation fixed in said option contract" and that "the United States Supreme Court in the case of Muschany v. United States, 89 L. Ed. Adv. Op. 492 (1945), had held an option contract to be valid and binding, which option contract is identical with the provisions of the option contract in this case with the exception of the names of the owners, the description of the property and the amount of compensation."

Petitioner, Edward J. Linnenbringer, answered (R. 156) said motion and alleged, inter alia, that he (Emma Linnenbringer, his wife, having died) was "entitled to judgment in the said cause for the sum of $34,000.00 with interest on said sum at 6% per annum from the 13th day of January, 1941, to June 18, 1941, and interest on the

sum of $34,000.00 less the sum of $16,000.00 deposited in the registry of this court on June 18, 1941, to-wit, the sum of $18,000.00 at 6% per annum from June 18, 1941, to date said entire sum is paid to this defendant."

On May 17, 1945, before the court ruled on its motion, the United States deposited in the registry of the court the $18,000.00 (R. 160).

The District Court entered its opinion (R. 162) on June 8, 1945, and entered its findings and judgment (R. 180) on July 2, 1945, awarding the petitioner the sum of $34,000.00 as the price of the land along with $4,230.00, being the amount of interest at the rate of 6% per annum, which the Court held due the petitioner under the Declaration of Taking Act on $18,000.00 from June 18, 1941, the date of the deposit of $16,000.00, to May 17, 1945, the date when the $18,000.00 was deposited in the Registry of the Court. The $18,000.00 was the difference between $34,000.00, the price of the land fixed in the contract, and the $16,000.00 which was deposited in the Registry of the District Court as the estimated just compensation. Petitioner had sought interest from the date of actual taking of possession on January 13, 1941, but the District Court ruled against that contention and held that interest should run from the filing of the Declaration of Taking and since the petitioner did not appeal from that holding he is bound by that portion of the findings and judgment.

On April 9, 1946, the Circuit Court of Appeals for the Eighth Circuit entered its judgment, 155 F. (2d) 77 (R. 305), reversing the judgment of the District Court. In the opinion in this cause the Circuit Court of Appeals referred to and adopted an opinion filed by it the same day in the case of Oliver v. United States, 155 F. (2d) 73 (No. 13154 in the Circuit Court of Appeals).

In that opinion (R. 296) the Circuit Court of Appeals held that the contract did not provide for the payment of

interest, that the purchase price provided was "not merely the agreed fair value of the land," but "may be fairly regarded, at the very least, as the agreed equivalent of just compensation for the taking of land by condemnation or by purchase" (R. 302). It was held that: "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract" (R. 302). The Court further held that "in the absence of a statute or an express contract providing for it, interest cannot be added to an obligation of the United States," and that the allowance of interest upon the price "would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation, '* * * interest does not run upon claims against the government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353" (R. 303).

The Circuit Court of Appeals further stated (R. 303) that it thought United States v. Baugh (C. C. A. 5th), 149 F. 2d 190, "may be distinguished * * * on the ground that the contract there involved was interpreted by the Court as fixing only the fair value of the land for the purpose of a condemnation then proceeding, but that: If, however, this distinction is not warranted, we are unable to follow the decision of the Baugh case."

ERRORS ASSIGNED, SUMMARY OF ARGUMENT AND AUTHORITIES.

I.

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the petitioner was not entitled to interest from June 18, 1941 to May 17, 1945 on $18,000, which was the difference between $16,000 deposited in the Court as the estimated just compensation on June 18, 1941 and $34,000 awarded by the Court as the value of the land pursuant to a motion by the Government based upon a valid and binding purchase contract where the said $18,000 was not deposited in the court until May 17, 1945, because:

A. The Fifth Amendment to the Constitution requires the Government in a condemnation proceeding to compensate the landowner not only for the value of the land at the time of taking, but where the taking precedes payment, the Government must in addition to the value at the time of taking pay the landowner an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the additional amount which must be paid to the landowner.

Constitution of the United States, Fifth Amendment;
Parks v. Boston, 15 Pick. (32 Mass.) 198;
Jacobs v. United States, 290 U. S. 13;
United States v. Rogers, 255 U. S. 163;
Phelps v. United States, 274 U. S. 341;
Brooks-Scanlon Corp. v. United States, 265 U. S. 106;
Shoshone Tribe v. United States, 299 U. S. 476;

Seaboard Air Line R. Co. v. United States, 261 U. S. 299;
United States v. Klamath Indians, 204 U. S. 119;
United States v. Benedict, 261 U. S. 294;
Brown v. United States, 263 U. S. 78;
Danforth v. United States, 308 U. S. 271;
Reed v. Chicago, M. & St. P. R. Co. (C. C. 1885), 25 F. 886;
United States v. Sargent (C. C. A. 8th, 1908), 162 F. 81 (writ of error dismissed in 215 U. S. 618);
Weiser Valley Land & Water Co. v. Ryan (C. C. A. 9th, 1911), 190 F. 417;
United States v. First National Bank (D. C. 1918), 250 F. 299;
Prince Line v. United States (D. C. 1922), 283 F. 535 (writ of error dismissed in 263 U. S. 727);
United States v. Bothwell Co. (D. C. 1925), 7 F. (2d) 624;
Commercial Station Post Office v. United States (C. C. A. 8th, 1931), 48 F. (2d) 183;
Seaside Improvement Co. v. Commissioner of Internal Revenue (C. C. A. 2d, 1939), 105 F. (2d) 990 (cert. denied 308 U. S. 618);
Atlantic Coast Line R. Co. v. United States (C. C. A. 1943), 132 F. (2d) 959;
United States v. Highsmith, 257 F. 401, affirmed 255 U. S. 170;
United States v. Sixty-Two Parcels of Land in New Castle County (D. C. Del., 1938),22 F. Supp. 540;
United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N. Y. (C. C. A. 2d 1945), 147 F. (2d) 351;
United States v. Baugh (C. C. A. 5th), 149 F. (2d) 190;
United States v. 412.715 Acres of Land in Contra Costa County (D. C. Cal.), 60 F. Supp. 576;
United States v. 40.379 Square Feet of Land, More or Less, in City of Newton, Middlesex County, Mass. (D. C. Mass. 1944), 58 F. Supp. 246;
United States v. Certain Land in City of St. Louis, Missouri (D. C. Mo. 1944), 58 F. Supp. 305;

United States v. 17,280 Acres of Land, More or Less, Situate in Saunders County, Neb. (D. C. Neb. 1944), 57 F. Supp. 745;
United States v. 26.3765 Acres of Land, More or Less, Situate in Town of Hempstead, Nassau County, N. Y. (D. C. N. Y.), 62 F. Supp. 910;
United States v. 20.08 Acres of Land in Harmar Tp., Allegheny County, Pa. (D. C. Pa.), 35 F. Supp. 265;
United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa. (D. C. Pa. 1944), 54 F. Supp. 193;
United States ex rel. T. V. A. v. Indian Creek Marble C. (D. C. Tenn.), 40 F. Supp. 811;
United States v. Northern Pac. Ry. Co. (D. C. Wash. 1943), 51 F. Supp. 749;
Plum v. Kansas City, 101 Mo. 525;
Webster v. The Kansas City & S. Ry. Co., 116 Mo. 114, 22 S. W. 474;
Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63 S. W. 85;
United States v. Certain Land in the City of St. Louis, Mo. (D. C. Mo. 1941), 41 F. Supp. 809, affirmed O'Donnell v. United States, 131 F. (2d) 882.

B. The Declaration of Taking Act requires the payment of interest where there is a delay in payment in accordance with the constitutional requirements of just compensation. Indeed, the purpose of the Act is to provide a means whereby the burden on the Government of paying interest can be reduced at the same time the landowners' constitutional rights are protected:

Constitution of the United States, Fifth Amendment;
Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a;
Seaboard Air Line R. Co. v. United States, 216 U. S. 299;

a motion for a supplemental order requiring the United States to deposit sums equal to 6% interest on the awards calculated from April 19, 1912, the time when the lands were taken by flooding and such an order was entered. This Court, in upholding the requirement of the payment of interest, said at l. c. 168-169:

> "* * * Was there error in awarding the owners interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?
>
> "It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. United States ex rel. Angarica v. Bayard, 127 U. S. 251, 260, 32 L. Ed. 159, 163, 8 Sup. Ct. Rep. 1156; United States v. North Carolina, 136 U. S. 211, 216, 34 L. Ed. 336, 338, 10 Sup. Ct. Rep. 90, cited and approved in National Home v. Parrish, 229 U. S. 494, 496, 57 L. Ed. 1296, 1298, 33 Sup. Ct. Rep. 944. **In the present case the landowners did not sue upon a claim against the government,** as was the fact in United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. Ed. 935, 40 Sup. Ct. Rep. 518. **The government was seeking, for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.**
>
> "**Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property.** Monongahela Nav. Co. v. United States, 148 U. S. 312, 314, 37 L. Ed. 463, 473, 13 Sup. Ct. Rep. 622."

Application of the same principle is to be found in a number of other decisions by this Court. See: Phelps v. United States, 274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; Shoshone Tribe v. United

States, 299 U. S. 476; Seaboard Air Line R. Co. v. United States, 261 U. S. 299; United States v. Klamath Indians, 304 U. S. 119; United States v. Benedict, 261 U. S. 294; Brown v. United States, 263 U. S. 78; Danforth v. United States, 308 U. S. 271.

Lower Federal Courts have likewise applied the same rule:

Reed v. Chicago, M. & St. P. R. Co. (C. C. 1885), 25 F. 886;

United States v. Sargent (C. C. A. 8th, 1908), 162 F. 81 (writ of error dismissed in 215 U. S. 618);

Weiser Valley Land & Water Co. v. Ryan (C. C. A. 9th, 1911), 190 F. 417;

United States v. First National Bank (D. C. 1918), 250 F. 299;

Prince Line v. United States (D. C. 1922), 283 F. 535 (writ of error dismissed in 263 U. S. 727);

United States v. Bothwell Co. (D. C. 1925), 7 F. (2d) 624;

Commercial Station Post Office v. United States (C. C. A. 8th, 1931), 48 F. (2d) 183;

Seaside Improvement Co. v. Commissioner of Internal Revenue (C. C. A. 2d, 1939), 105 F. (2d) 990 (cert. denied 308 U. S. 618);

Atlantic Coast Line R. Co. v. United States (C. C. A. 1943), 132 F. (2d) 959;

United States v. Highsmith, 257 F. 401, affirmed 255 U. S. 170;

United States v. Sixty-Two Parcels of Land in New Castle County (D. C. Del. 1938), 22 F. Supp. 540;

United States v. 6.87 Acres of Land in Village of Garden City, Nassau County, N. Y. (C. C. A. 2d, 1945), 147 F. (2d) 351;

United States v. Baugh (C. C. A. 1945), 149 F. (2d) 190;

United States v. 412.715 Acres of Land in Contra Costa County (D. C. Cal. 1945), 60 F. Supp. 576;

United States v. 40,379 Square Feet of Land, More or Less, in City of Newton, Middlesex County, Mass. (D. C. Mass. 1944), 58 F. Supp. 246;
United States v. Certain Land in City of St. Louis, Missouri (D. C. Mo. 1944), 58 F. Supp. 305;
United States v. 17,280 Acres of Land, More or Less, Situate in Saunders County, Neb. (D. C. Neb. 1944), 57 F. Supp. 745;
United States v. 26.3765 Acres of Land, More or Less, Situate in Town of Hempstead, Nassau County, N. Y. (D. C. N. Y.), 62 F. Supp. 910;
United States v. 20.08 Acres of Land in Harmar Tp., Allegheny County, Pa. (D. C. Pa. 1940), 35 F. Supp. 265;
United States v. 125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa. (D. C. Pa. 1944), 54 F. Supp. 193;
United States ex rel. T. V. A. v. Indian Creek Marble Co. (D. C. Tenn.), 40 F. Supp. 811;
United States v. Northern Pac. Ry. Co. (D. C. Wash. 1943), 51 F. Supp. 749.

The same rule is applied in Missouri, the state in which the land here involved is located. Plum v. Kansas City, 101 Mo. 525; Webster v. The Kansas City & S. Ry. Co., 116 Mo. 114, 22 S. W. 474; Miller v. St. Louis & K. C. R. Co., 162 Mo. 424, 63 S. W. 85.

While the Circuit Court of Appeals for the Eighth Circuit in the instant case recognized the principle that a landowner is entitled to interest upon the fair value of the land from the date of taking until payment, citing (R. 300) United States v. Rogers, supra, and Seaboard Air Line R. Co. v. United States, supra, it totally failed to apply that principle to the facts of the instant case. This failure undoubtedly resulted in part from a misconception of the nature of this required additional compensation which is measured by "interest." The "interest" is not recoverable qua interest but as a pragmatic method of

arriving at the just compensation required by the Fifth Amendment. It is a formula for calculating or measuring the additional amount which must be paid the landowner in order that he will receive just compensation where the taking precedes payment. As said by this Court in Jacobs v. United States, 290 U. S. 13, 16-17:

> "* * * The concept of just compensation is comprehensive and includes all elements. 'And no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a **good measure** by which to ascertain the amount so to be added.'"

This additional amount is added to the value determined as of the time of the taking. Thus this Court said in United States v. Klamath and Moadoc Tribes, 304 U. S. 119, 123:

> "Nor is it quite accurate to say that interest as such is added to value at the time of the taking in order to arrive at just compensation subsequently ascertained and paid. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

And given the taking, the right to an additional amount, where payment is made subsequently, in the form of "interest" or a fair equivalent thereof, "attaches itself automatically to the right to an award of damages." Shoshone Tribe v. United States, 299 U. S. 476, 497.

It is sometimes said that this measure of "interest" is to compensate for the delay in payment of the value of the land taken. United States v. 6.87 Acres of Land in Village of Garden City (C. C. A. 2d), 147 F. (2d) 351.

> "The jury erred in calling the damages for delay 'interest.' It was the duty of the jury to determine the damages for delay by an interest rate. • • • The error in form of the verdict does not affect the substantial rights of the parties." United States v. 20.08 Acres of Land in Harmar Tp. (D. C. Pa. 1940), 35 F. Supp. 265.

The more generally accepted and sounder rationale is that the additional amount is to compensate the owner for the use of the property after the taking and prior to payment therefor. Regardless of which rationale is adopted, the result is the same: the additional amount, measured by "interest," is not interest per se, but is a necessary part of just compensation.

> "Such additional allowance may be measured by a reasonable rate of interest but it is not properly interest. Phelps v. United States, 274 U. S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083. Interest is allowed, not as interest, but as the equivalent of the value of the use of the property or its money equivalent."
>
> United States v. Northern Pac. Ry. Co. (D. C. Wash. 1943), 51 F. Supp. 749, 750.

> "The United States had possession of the land from the date of taking until the day of the verdict of the jury and thereafter. For the damages suffered by the owner during that period the owner is entitled to just compensation. The 6 per cent interest contained in the instruction of the court was not to be awarded qua interest for default or delay in paying the value of the land at the time of the taking, but qua damages for dispossessing the owner during that period of time."
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> United States v. Sixty-two Parcels of Land (D. C. Del. 1938), 22 F. Supp. 540.

"The Fifth Amendment to the Federal Constitution guarantees to property owners full compensation for property taken for public use. That the full compensation guaranteed by the Constitution includes interest on just compensation finally awarded when all or a portion thereof is withheld after the taking is no longer an open question. The full compensation includes the value of the use of the property after the taking and prior to payment therefor (cases cited). But interest as such is not **added** to value at the time of taking in order to arrive at just compensation subsequently ascertained and paid. Interest is merely the equivalent of the value of a portion of the property taken, in this instance the value of the use of the property at the time it was taken."

United States v. Certain Land in City of St. Louis, Mo. (D. C. Mo. 1941), 41 F. Supp. 809, 812, affirmed O'Donnell v. United States, 131 F. (2d) 882.

In United States v. 40,379 Square Feet of Land (D. C. Mass. 1944), 58 F. Supp. 246, the Government instituted proceedings pursuant to the 1888 Act, 40 U. S. C. A., Secs. 257, 258, and took possession under a court order on May 26, 1943. Subsequently, on August 2, 1943, it filed a declaration of taking pursuant to 40 U. S. C. A., Sec. 258 (a). It was there held that the landowner was entitled to $45,180, the value of the land at the time of the taking, along with $1,500 as the fair market value of the use of the land from May 26, 1943, to August 2, 1943. Also interest was allowed on the amount awarded for use and occupancy at the local rate from the date of taking to August 2, 1943, day of judgment. Interest on the value of the land less the amount deposited in court was allowed at 6 per cent from the date of making the deposit until date of payment.

In United States v. 412.715 Acres (D. C. Calif. 1945), 60 F. Supp. 576, the landowners were excluded from possession on June 25, 1942. The declaration of taking was not

filed until March 15, 1945, and during the interim the landowners became liable for taxes. In order to compensate the landowners for the payment of these taxes as well as for the loss of use and occupancy the court awarded interest at 7 per cent per annum.

The foregoing body of law is clear and unequivocal. Where property is taken by the United States but the landowner is not paid the value at the time of the taking, he must be paid an additional amount, measured by interest, from the time of taking until the date of payment, if the just compensation requirement of the Fifth Amendment is to be satisfied.

II.

The Declaration of Taking Act Requires the Payment of Interest Where There Is a Delay in Payment in Accordance With the Constitutional Requirement of Just Compensation. Indeed, the Purpose of the Act Is to Provide a Means Whereby the Burden on the Government of Paying Interest Can Be Reduced at the Same Time the Landowner's Constitutional Rights Are Protected.

The landowner's right to just compensation, including an amount additional to the value of the land where payment is subsequent to the taking, "cannot be taken away by statute." Seaboard Air Line R. Co. v. United States, 216 U. S. 299. Moreover, "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." Phelps v. United States, 274 U. S. 341. The fact is that the very purpose of the Declaration of Taking Act was to protect the constitutional right of the landowner to just compensation, including that portion measured by interest, and at the same time to relieve the Government of the burden of

interest. This Court said in United States v. Miller, 317 U. S. 369, 381:

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and **to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment** in the eminent domain proceeding. Second, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. **The Act recognizes that there may be an error in the estimate** and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, **the owner shall recover the excess with interest.**"

See also:

United States v. 1,997.66 Acres of Land (CCA 8th, 1943), 137 F. (2d) 8;
United States v. 0.45 Acres of Land (CCA 2d, 1945), 151 F. (2d) 114.

And as said by this court in Catlin v. United States, 324 U. S. 229, the purpose of the Act "was to leave intact the owner's remedy existing before the statute was adopted."

While it has been held that where the actual taking of possession precedes the filing of the declaration of taking, the landowner is entitled to interest from the date of actual taking rather than from the date of the filing of the declaration of taking (United States v. 26.3765 Acres of Land [D. C. N. Y. 1945], 62 F. Supp. 910), that question is not presented in this case. Actual possession of the land had been taken on January 13, 1941 (R. 151). The Declaration of Taking was not filed and the estimated just compensation was not deposited until June 18, 1941 (R. 137, 143). While the landowner had sought interest from January 13, 1941, in the District Court, that court

ruled against this contention and started interest from June 18, 1941 (R. 185). Since the landowner did not appeal from this ruling he is bound by that portion of the findings and judgment. Consequently, the question here presented is the landowner's right to interest from the date of the filing of the Declaration of Taking to the date of the payment of the excess above the "estimated compensation" paid into the registry of the Court.

The United States deposited in the District Court, on June 18, 1941 the sum of $16,000 as the estimated just compensation (R. 143, 182). By this act, the United States repudiated the contract (R. 149) theretofore entered into between it and the landowner whereby the agreed purchase price or valuation of the land was fixed at $34,000. Although the landowner had proceeded to perform his obligations under the contract and the United States had taken possession of the land pursuant to the contract (R. 151), the United States did not take title to the land pursuant to the contract. This it could have easily done by either of two methods. If the United States was satisfied with the title delivered by the owner it could have accepted that title and compensated the landowner in the agreed amount. Or, if not satisfied with the title, the United States could have, as provided in the contract, commenced condemnation proceedings and deposited in the court the agreed amount of $34,000 and a consent verdict would have been entered in said amount (R. 151). The United States chose not to acquire land by either of these methods. Instead it repudiated (R. 301) the contract and commenced adversary condemnation proceedings. It acquired title to the land by virtue of the "Order and Judgment on Declaration of Taking" (R. 140), filed by the District Court on June 18, 1941. That order vested title to the land in fee simple absolute in the United States upon the filing of the Declaration of Taking and the depositing of the estimated compensa-

tion. The Order recited that the Petition and Declaration of Taking "state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition" (R. 140). The Court directed that "the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law" (R. 142).

Having acquired title, the next question was the ascertainment of the valuation of the land as of the time of the taking. While the landowner by his answer (R. 143, 152) brought this question to issue by alleging that the contract price of $34,000 determined the value of the land and the time of the taking from which he was entitled to interest, it was the United States itself that moved (R. 154) the District Court on April 6, 1945, to the effect that the United States "had executed an option contract for the purchase * * * from the defendants the said real estate for the sum of $34,000.00, being the amount of compensation fixed in said option contract," and that said option was "valid and binding." It is significant that the United States moved the Court "to enter judgment in this cause for the **condemnation** of the said real estate, **fixing the compensation** to be paid by plaintiff to the defendants **in the sum of $34,000**" (R. 155).

Here the cause was at all times a condemnation proceeding and the condemnation statute invoked (the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a) expressly provides for the payment of interest. **Can the United States invoke such a statute, acquire title to land for public use under such statute, move for the fixing of the compensation at a specified contract price of $34,000 and then avoid payment of interest on the $18,000 not de-**

posited for a period of almost four years, when the statute specifically requires the payment of interest? If the United States is able to frustrate the very purpose of the statute, it will destroy the guarantee of just compensation found in the Fifth Amendment to the Constitution. This it can do, if the technique adopted by the government in this condemnation is followed, by simply obtaining contracts and taking possession, then waiting any length of time it desires before commencing condemnation proceedings in which it would move for entry of judgment at the contract price. The Constitutional right to just compensation should not be so ludicrously defeated.

The Declaration of Taking Act fully recognized that the Government could not estimate the just compensation with infallible accuracy. Consequently, the Act provides (Section 1) that after just compensation is ascertained and awarded, the landowner shall be entitled as part of just compensation interest at the rate of 6 per centum per annum on the amount the final award exceeds estimated just compensation which was paid into the court. Such a provision as this was necessary to satisfy the requirements of just compensation guaranteed in the Fifth Amendment.

Thus in Lee v. United States (Ct. App. D. C. 1932), 58 F. (2d) 879, landowners challenged the constitutionality of an act (Act of May 25, 1926, as amended by Acts of January 13, 1928 and March 31, 1930, 44. Stat. 630, 45 Stat. 31, 46 Stat. 136, 40 U. S. C. A. Sec. 341 et seq.) which authorized the Secretary of Treasury to condemn certain lands in Washington, D. C. That Act's provisions are almost identical to those subsequently established in the Declaration of Taking Act in that it provides for the filing of a declaration of taking, the depositing of estimated just compensation, and the payment of 6% interest on the award or so much as is unpaid from

the date of the taking to the date of final payment. The landowners contended that these provisions were unconstitutional in that the taking was not accompanied or preceded by payment. The court rejected this contention and after summarizing the provisions, it said (l. c. 880):

> "• • • These provisions, when carried into effect, followed by the taking of the property, amount to a pledge of the public faith and credit, and the judgment rendered in such proceeding is as binding on the United States as a judgment in a proper case would be upon the humblest individual in the land. • • • The taking being duly authorized by Congress, there arises, upon the happening of that event, at once a pledge to pay, and the pledge becomes complete and definite when the ascertainment of just compensation has been duly had and a judgment entered therefor. In such a case it is unthinkable that Congress will not, with appropriate speed, procide the necessary money to discharge the judgment **and interest to the date of payment**, and this is all the Fifth Amendment requires in a case in which the sovereign is asserting the power of eminent domain. Crozier *v.* Krupp, 224 U. S. 290, 306, 32 S. Ct. 488, 56 L. Ed. 771."

In the instant case there was, as Congress anticipated there would occasionally be, an error, a substantial error, in the estimated just compensation. The Circuit Court of Appeals assigned this error to "the mistaken belief that the contract was void" (R. 302), but it was the United States that moved (R. 154) the District Court that the contract was "valid and binding." Obviously, the "agreed purchase price" or "agreed valuation," as the contract terms the $34,000, was the valuation as of the time the contract was entered into and the possession of the land acquired. "The just compensation constitutionally required is not the same thing as the sale price

of a capifal asset." Kieselbach v. Commissioner of Internal Revenue, 317 U. S. 399. Moreover, the Declaration of Taking Act provides for the payment of interest in just such a situation where an error has been made. The money deposited with the declaration of taking is not accepted in full of the demand. As said by the Circuit Court of Appeals for the Fifth Circuit in Atlantic Coast Line R. Co. v. United States, 132 F. (2d) 959: "The money thus deposited is not offered or accepted as in full of the demand, but is without prejudice and only to escape liability for accruing interest." In the instant case the District Court properly ordered at the time the title was vested in the United States that the just compensation "shall be ascertained and awarded in said proceeding • • • pursuant to law" and it is submitted that the District Court properly applied the law established under the Fifth Amendment and by the Declaration of Taking Act.

When the United States repudiated the option contract and commenced action pursuant to the Declaration of Taking Act by filing the declaration of taking, the condemnation was then "effected and title completely vested in the Government by the mere filing of a declaration of taking." The Government could not subsequently abandon the proceeding "so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money." United States v. Sunset Cemetery Co. (CCA 7th 1943), 132 F. (2d) 163; Catlin v. United States, 324 U. S. 229. Nor could the landowner, after the Government invoked the exclusive jurisdiction of the District Court under the Declaration of Taking Act, bring a cause of action in the Court of Claims under the Tucker Act on any claims arising out of the condemnation. The Court of Claims would not have jurisdiction of such action. Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. It is thus

seen that the only forum in which the landowner could stand on the valuation fixed by the contract was in the condemnation suit instituted by the United States; and the terms of the condemnation act invoked by the Government controlled the jurisdiction of the court and the proceedings. Danforth v. United States, 308 U. S. 271.

The controlling condemnation statute, the Declaration of Taking Act, requires the payment of interest. As we will next show, it makes no difference that the value of the land at the time of the taking was fixed by a valid and binding contract. The fact remains that only $16,000 was deposited (R. 143) as the estimated just compensation on June 18, 1941; that the judgment (R. 185) for the value of the land was $34,000; that the $18,000 difference was not paid into court until May 17, 1945 (R. 160). Since this is a condemnation proceeding instituted and prosecuted by the Government under the provisions of the Declaration of Taking Act, such facts require the payment of interest on $18,000 from June 18, 1941 to May 17, 1945 at the rate of 6 per cent. per annum.

III.

The Fact That the Value of the Property in a Condemnation Proceeding Is Fixed by a Valid Purchase Contract Between the Government and the Landowner Does Not Affect or Diminish the Right of the Landowner to Interest. Such Rights of the Landowner Are Determined by the Condemnation Statute Invoked by the Government.

There is only one conceivable factual difference between the instant case and numerous decisions cited under Points I and II holding that both the Fifth Amendment and the Declaration of Taking Act require the payment of interest where taking precedes payment. Here the price

or valuation of the land was fixed by contract at the time of the taking, instead of being fixed by commissioners or by a jury. While the Government repudiated the contract (R. 301) and instituted adversary condemnation proceedings, the fact is clear that it was the United States, on its own initiative before the District Court entered judgment, which moved the District Court to enter judgment in condemnation fixing the compensation of the landowner at the contract price of $34,000.00, because this Court, in Muschany v. United States, 324 U. S. 49, had held such contracts "valid and binding." It should also be noted that the United States voluntarily deposited the $18,000.00 in Court on May 17, 1945 (R. 160), even before the District Court ruled on its motion on July 2, 1945. The District Court did enter judgment (R. 180) directing the just compensation of the landowner to be $34,000.00 in accordance with the contract along with $4,230.00, being the amount of interest at the rate of 6% per annum as provided in the Declaration of Taking Act, on $18,000.00 from June 18, 1941, to the date of the order and judgment entered on the filing of the declaration of taking (R. 140), to May 17, 1945, the date the $18,000.00 was deposited in the registry of the court (R. 160).

There is no dispute that from June 18, 1941 to May 17, 1945 the landowner was deprived both of the use of the land and of a portion of its money equivalent. There is no dispute that the land was taken. The Circuit Court of Appeals held that no interest was allowable in the instant case because "the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled * * * by the terms of the purchase contract."

This holding is in direct conflict with the decision of this Court in Danforth v. United States, 308 U. S. 271. In the Danforth case the United States and Danforth, the

landowner, entered into a contract whereby the United States agreed to pay a designated amount for a perpetual flowage easement over the landowner's land. Later the United States came to the conclusion that the contract price was in excess of the actual value, so it repudiated the contract and commenced condemnation proceedings pursuant to the provisions of the Mississippi River Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. S. C. A., Sec. 702a et seq. The landowner in both his answer and in a counterclaim pleaded the contract and prayed judgment for the contract price along with interest. The Circuit Court of Apepals for the Eighth Circuit in that case (Danforth v. United States, 102 F. [2d] 5, rev'd 308 U. S. 271) held that the landowner's contention was founded upon an attempt to enforce a contractual obligation of the United States, which is the same holding that Court made in the instant case. From that holding the Circuit Court of Appeals in that case further concluded that the District Court did not have jurisdiction to consider the landowner's claim because the amount involved exceeded the jurisdictional amount of such claims which could be brought in the District Court by virtue of the provisions of the Tucker Act, Section 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

The Circuit Court of Appeals there gave two reasons for this conclusion, (1) that the United States was asserting a privilege inherent solely by virtue of sovereign power and not as a private suitor, and thus in no way waived immunity from suit, and (2) the landowner was clearly attempting to enforce a contract.

This Court, in Danforth v. United States, 308 U. S. 271, could not agree with that interpretation. It said, l. c. 282-283:

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement

sought. Paragraph 3 of the letter shows condemnation was in mind.

"This action is brought under the provisions of Sec. 4 of the Flood Control Act. The jurisdiction of the Court to consider the landowner's contention depends upon the language of that Act, not upon the Tucker Act or the general statute on condemnation. We have no doubt that the authority to purchase given the Secretary of War is sufficiently broad to authorize a purchase of petitioner's interest in land subject to perfecting the title through condemnation. The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title."

In the Danforth case the Government invoked the Flood Control Act, supra, and it was held that that Act determined the jurisdiction of the Court—that the cause was, therefore, not an action on contract. In the instant case, a different condemnation Act was invoked by the United States; but by the same reasoning, this is not an action on contract and was not so converted by the landowner in standing on the purchase contract as fixing the value. Instead, this proceeding is governed by the terms of the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. That Act provides for the payment of interest on so much of the just compensation as is not deposited into Court from the date of taking to the date of payment. The Flood Control Act involved in the Danforth case has no such provision for taking possession, and possession was not taken prior to payment of the money. Consequently this Court in the Danforth case found there was no interest due, because possession had not been taken. This Court there pointed out: "Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view

that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor." It should definitely be observed that this Court there said, "The Congress in other situations has adopted the time of taking as the date for determination of value" and cited the Declaration of Taking Act as an example of this situation (l. c. 283-284).

Thus, it is clear, under the holding of this Court in the Danforth case, that the Declaration of Taking Act, being the Act invoked by the Government, controls the instant case as to the requirement of determining just compensation at the time of taking and the payment of interest on the amount withheld from the landowner from the time of taking to the date of payment. The Declaration of Taking Act specifically requires the payment of interest "on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment." Here the Government took actual possession on or about January 13, 1941 (R. 151). The deposit of $16,000, as estimated just compensation, was made on June 18, 1941 (R. 143, 182). But, it was not until May 17, 1945, that the Government deposited the remaining $18,000 in the registry of the District Court (R. 160, 182). There can be no question that upon the filing of the declaration of taking and the depositing of the estimated just compensation, the title was so irrevocably vested in the Government that the Government could not abandon the proceedings. The Circuit Court of Appeals for the Seventh Circuit said in United States v. Sunset Cemetery Co., 132 F. (2d) 163, 164:

> "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Government by the mere filing of a declaration of taking and a judgment adjudging title in the United States is wholly unnecessary. Such is the statutory mandate. It follows that from and after the vesting

of title, the Government can be divested only by virtue of appropriate congressional authorization and not by an amended taking * * * Consequently the proceeding may not be subsequently abandoned so as to deprive the owner whose property has been taken of his constitutional right to have the damages assessed and paid in money."

Under the ruling of this Court in the Danforth case, the instant case clearly presents the following situation: The United States commenced these proceedings under the Declaration of Taking Act. Under that Act the value of the land could be fixed by a purchase contract and the landowner by standing on the price fixed by the purchase contract would not be maintaining a suit on a contract so as to oust the District Court of jurisdiction by virtue of the Tucker Act, supra. The Declaration of Taking Act, not the Tucker Act, controlled the jurisdiction of the District Court.

If this cause had been converted into a suit on contract the District Court would not have had jurisdiction under the terms of the Tucker Act because the amount involved is in excess of $10,000. This requirement as to amount is jurisdictional and one upon which the courts, on their own motion, must insist. Hammond-Knowlton v. United States, 121 F. (2d) 192, 202, cert. denied 314 U. S. 694. The Circuit Court of Appeals recognized that the Tucker Act was not applicable because, even though it held the action to be controlled by contract rather than the condemnation statute invoked, it nevertheless sustained the jurisdiction of the District Court by reversing, 155 F. (2d) 77, the instant case, 61 F. Supp. 199, and affirming, 155 F. (2d) 73, United States v. Oliver, 60 F. Supp. 741.

The observation of this Court in United States v. North American Transp. & Trading Co., 253 U. S. 330, should be noted. There, on the facts, interest was denied, but this Court said that interest could be collected "as a part of

just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the Government institutes in order to secure title to land." The instant case is such an adversary condemnation proceeding brought by the Government pursuant to the Declaration of Taking Act in which the owner is the defendant. A necessary step in such a condemnation proceeding is the determination of the value of the land at the time of the taking and the determination of the just compensation due the landowner, including interest, where there has been a denial of the use of the land and its money equivalent. This is an integral part of the condemnation proceeding. Here the Government itself moved the District Court to fix the landowner's compensation at the value fixed in the contract. The interest required to render just compensation was operative by the statute invoked by the Government. The whole process of condemnation, including that of fixing just compensation, is one continuous integrated process of litigation. Hopkins v. McClure, 148 F. (2d) 67, 70.

Indeed, where the Government has instituted condemnation proceedings the District Court then has exclusive jurisdiction over all matters involved in the condemnation proceedings and the Court of Claims will not take jurisdiction of a suit in which the landowner seeks judgment on a claim allegedly arising out of the taking of the property involved in the condemnation proceedings, Dominion Smelting & Refining Corp. of N. J. v. United States, 102 Ct. Cl. 281. In that case the United States instituted condemnation proceedings pursuant to specified condemnation statutes and (after the condemnation proceedings were instituted, declaration of taking filed along with

estimated just compensation and the order vesting title in the United States was entered) the owners of leasehold interests filed suit in the Court of Claims for damages incident to the condemnation. The Court of Claims refused to take jurisdiction of the suit filed there on the ground that the District Court had exclusive jurisdiction; it said:

> "Under these acts the only court in which condemnation proceedings could have been brought was in the court in which they were brought, to-wit, the District Court for the District of New Jersey. That court has full jurisdiction to render a judgment for just compensation for the property taken, and to distribute the proceeds of that judgment among the various persons having an interest in that property in accordance with their respective interests. Plaintiffs in that suit can assert every right they have for just compensation for the taking of their interest in the property.
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> "Just compensation includes not only the value of the various interests taken, but also every other element which goes to make up just compensation. • • •
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> "It is not our function, however, to determine in this suit what damages plaintiffs are entitled to recover. They can recover only because they are a part of the just compensation required by the Constitution to be paid for the taking of their property for public use. Transportation Co. v. Chicago, 99 U. S. 635; Gibson v. United States, 166 U. S. 269; Josten Co. v. Providence, supra; Mitchell v. United States, supra; Sharp v. United States, 191 U. S. 341; United States v. Grizzard, supra. By the Act of August 1, 1888, supra, jurisdiction to determine this question is vested exclusively in the District Court in which the condemnation proceedings are filed.
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> "This court has jurisdiction to award judgment for just compensation for property taken and damages incident to the taking only where the property has been taken without the institution of condemnation

proceedings. Condemnation proceedings have been instituted in these cases. The court in which they were instituted has exclusive jurisdiction."

Once the Government repudiated the purchase contract, after it had taken possession of the land, and instituted the adversary condemnation proceedings, it could not abandon that proceeding. United States v. Sunset Cemetery Co. (C. C. A. 7th), 132 F. (2d) 163. The landowner could not bring, even if he had wanted to, action in the Court of Claims. Under the ruling of this Court in Danforth v. United States, supra, the landowner by standing on the price fixed in the contract in the condemnation proceedings did not convert the action into one on contract. The governing statute was the Declaration of Taking Act pursuant to which the Government instituted the proceedings and took title. The provisions of that Act require the payment of interest.

The Danforth case completely settles any question that could have existed as to the validity of contracts between the Government and landowners fixing the value of the land taken by condemnation. See also Muschany v. United States, 324 U. S. 49, where the same form of contract here involved was held to be valid and binding. In the Muschany case interest was included in the judgment of the District Court, as granted by the District Court in the instant case, and the question of interest was not raised by the Government on appeal in that case. The clear language of the Danforth case that the condemnation statute invoked controls the question of taking along with the plain mandate of the Declaration of Taking Act requiring payment of interest unquestionably establish the landowner's right to interest in the instant case.

IV.

Where the Purchase Price or Valuation of Land Is Fixed by Contract Between the Government and the Landowner and the Government Subsequently Prosecutes an Adversary Condemnation Proceeding Under the Declaration of Taking Act, But Fails to Deposit the Full Amount of the Agreed Price in the Court, the Landowner Is Entitled to Interest on That Portion of the Value Which Was Not Deposited, From the Date of the Taking Until the Time It Was Finally Paid.

Prior to the instant case there appears to have been only one other case directly ruling on the right of a landowner to interest where the United States took title to land under the Declaration of Taking Act but where the value of the land was fixed by contract. In that case, United States v. Baugh, 149 F. (2d) 190, the Circuit Court of Appeals for the Fifth Circuit held that the landowner was entitled to interest on that portion of the agreed value which was not paid into court and made available to the landowner.

In United States v. Baugh, supra, the United States commenced condemnation proceedings under the Second War Powers Act, 50 U. S. C. A., appendix, Sec. 632, on August 24, 1942. Several months thereafter the owners of numerous parcels within the area entered into stipulations with the United States wherein the parties agreed upon certain sums as just compensation for the taking of their property. The various stipulations provided and agreed that the court was "authorized and petitioned to enter * * * final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any declaration of taking which may hereafter be filed by the plaintiff, vesting the title to the above-described property in the United States of America, and adjudging **just compensation** for the lands taken to be the sum

of * * *." The Government had taken possession of each tract of land slightly more than a year before any compensation was made available, and there was a delay of seven months after entering into the contract until the money was paid into the Court. The District Court allowed interest from the date of the stipulations to the date the money was deposited in the Court. The United States' only specification of error was that the allowance of interest "on the sums agreed upon by the parties as just compensation violates the terms of the agreements and the rule that interest does not run on contractual claims against the sovereign." The Circuit Court of Appeals for the Fifth Circuit in affirming the judgment of the District Court said at l. c. 192-193:

> "In the present case the Government did not take a deed from the landowner as in an outright purchase, but it acquired title and possession by condemnation. **The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation** and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights. Under the decisions cited above, the landowners had the constitutional right to receive not only just compensation but, where the taking precedes the payment, the landowner is also entitled to 'such addition as will produce the full equivalent of that value paid con-

temporaneously with the taking,' which additional value may be measured by the legal rate of interest, if reasonable, in the state where the property is located. * * *

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"The landowners apparently were willing at the date of the agreements to accept the sums of money stipulated without past interest and expected the Government to make prompt payment of the amount agreed upon. But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. **Their right to have interest is found in the Constitution and is neither found nor lost in the contract.**

"The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

It should be noted that the stipulation involved in the Baugh case specifically designated the agreed sum as "just compensation." It provided that the court be authorized to enter final judgment "adjudging **just compensation** for the lands taken, to be the sum of * * *." The contract in the instant case did not fix, or endeavor to fix, "just compensation." At all times, the contract here involved (R. 149-151) fixed only the **"purchase price"** or **"agreed valuation"** of the land. This contract provided that the Government would pay the "agreed purchase price" to the landowner upon the furnishing of a certificate of title. The contract further provided (R. 151):

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United

States in which said property is located, under a consent verdict fixing the award at the **agreed valuation** * * * and will upon filing its petition in such proceedings deposit said agreed **purchase price** * * *."

The attempted distinction of United States v. Baugh, supra, by the Circuit Court of Appeals below becomes meaningless, and is clearly **not warranted**, when the express language of the contract here involved, referring to the amount as the "agreed valuation" and "agreed purchase price" is read and compared with the language used in the stipulation and by the Court in United States v. Baugh, which refers to the amount there involved as "just compensation."

The conflict between the decisions of the two Circuit Courts of Appeal is further revealed by the totally diverse interpretation given by each of the Courts to the fact that neither the stipulation nor contract contained express provisions for the payment of interest. In the instant case the Circuit Court of Appeals stated (R. 302):

> "There is no provision in the contract for the payment of interest on the stipulated consideration, nor does the contract fix a time within which payment is required. * * * The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States. The purchase price stipulated in the contract may be fairly **regarded**, at the very least, as the agreed equivalent of just compensation for the taking of the land by condemnation or by purchase."

The interpretation given by the Fifth Circuit in United

States v. Baugh, on precisely the same question is diametrically opposed and in direct conflict with that of the Eighth Circuit in the instant case. This is clear from the following language in that case (149 F. [2d] 190, 192-193):

> "There is no mention in the stipulations that interest was, or was not, included. Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right. • • • Their right to have interest is found in the Constitution and is neither found nor lost in the contract.
>
> "The Constitution no more permits the deprivation of the money equivalent of land taken without just compensation than it does the deprivation of the use of land without just compensation."

The Circuit Court of Appeals in the instant case was not willing to go so far as to say that the agreed purchase price, without interest, **actually** was just compensation. It said that such agreed purchase price "may be fairly regarded" (R. 302) as the equivalent of just compensation. In this way it indicates that it considers the landowner to have impliedly waived the constitutional right to interest as well as its right to interest under the Declaration of Taking Act, 46 Stat. 1421, Ch. 307, 40 U. S. C. A., Sec. 258a. The Fifth Circuit, on the other hand (where the stipulation specifically designated the price as "just compensation" as contrasted with the contract here referring to it as the "agreed purchase price" or "agreed valuation"), stated that there was no reason to conclude that the landowner "**impliedly** waived any legal right" and that "their right to have interest is found in the constitution and is neither found nor lost in the contract."

The case of Holley v. United States (CCA 6th, 1942), 124

F. (2d) 909 (cert. denied 316 U. S. 685), while not ruling directly on the question of interest on an agreed valuation, throws some light on this question. There the City of Detroit and certain landowners contracted before condemnation was completed that the City would pay the awards in ten equal installments with interest on the unpaid balance. The opinion does not state whether the amount of the award was agreed upon or not. Pursuant to this contract the City made payments of the installments and interest. A landowner paid income tax on the interest payments, then filed a claim for a refund on the ground that the interest payments were exempt from taxation under the provision [Revenue Acts 1934, 1936, Sec. 22 (b), 26 U. S. C. A., Internal Revenue Code, Sec. 22 (b)] exempting interest on obligations of cities. The court rejected this contention and held that the interest was taxable as a portion of just compensation in a condemnation proceeding. It said:

> "While the contract to defer payment was voluntary, the taking was not, all the proceedings being under the power of eminent domain and necessarily compulsory upon the appellant. The compensation therefore had to be that required in condemnation proceedings, namely, the full equivalent of the value of the land at the time of the taking. Under such circumstances the interest is considered to be a part of the award itself, and essential to just compensation for the land where it is taken before full payment is made. Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664; Phelps v. United States, 272 U. S. 341, 47 S. Ct. 611, 71 L. Ed. 1083."

No doubt the failure of the Court below to reach the same conclusion that was reached in the Baugh case largely resulted from a misconception of the nature of "interest" required in such condemnation proceedings. (See discussion in Point I, supra.) The right to interest can not be

deprived a landowner because there is no specific demand to include interest, nor can the right to interest be taken away by statute or be qualified by the omission of a provision for interest. Jacobs v. United States, 290 U. S. 13. It is also submitted that the ruling of the Court below is erroneous as a result of confusion as to the precise nature of these adversary condemnation proceedings. (See discussion in Point V, infra, and Point II, supra.)

It is submitted that the reasoning of the Fifth Circuit in the Baugh case is sound and correct, whereas the decision and opinion of the Eighth Circuit in the instant case is not.

V.

The Payment of "Interest" in Condemnation Proceedings, Where the Taking of the Property Precedes Payment, Is Not the Awarding of Damages for Delay in Payment of an Obligation of the United States. Instead, Such "Interest" Is a Portion of Just Compensation Required by Both the Declaration of Taking Act and the Fifth Amendment.

Immediately prior to and during the period of this past war it was essential for the United States to acquire vast areas of land necessary for conducting numerous activities for the prosecution of the war. For one single project the War Department took over greater acreage than it took during the First World War. Marcus, Philip, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317, 326. The tremendous increase in condemnation is well indicated by the following table (see: Just, Carolyn, "Condemnation Procedure During World War II," 12 George Washington L. R. 286; see, also, Annual Reports of the Attorney General for the fiscal years ending June 30, 1939, 1940, 1941, 1942 and 1943):

"Fiscal Year Ending June 30

	1943	1942	1941	1940	1939
Number of new condemnation cases instituted	4,683	3,818	1,778	1,194	879
Number of tracts in cases filed...	43,970	36,920	12,333	6,372	6,069

"In 1942 these figures showed an increase in volume of 134 per cent over 1941, and 231 per cent over 1940. In 1943 there was an increase of 290 per cent over 1940. From the 1939 fiscal year to January 1, 1944, 13,973 separate condemnation actions were instituted for national defense, involving 118,664 tracts, and covering 22,202,564 acres, for which $357,965,922 was deposited into court as just compensation."

Most of the property acquired by the United States was secured through negotiation and contract. Marcus, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317, 344; "American Economic Mobilization," 55 Harv. L. Rev. 427, 509. Indeed, it is a basic policy of all acquiring agencies of the Government to exhaust the possibilities of voluntary purchase of property before resorting to condemnation. 1 Federal Eminent Domain 276.

The advantages of acquiring land by contract are obvious, especially where vast acreage must be speedily acquired. While the Declaration of Taking Act does provide a method whereby immediate possession and title can be obtained, there must still be under that Act a determination of value and considerable administrative detail. This can be eliminated by means of contract which provides, as the instant contract did, that a friendly condemnation suit will be prosecuted if necessary to clear the title. The obvious advantages of purchase by contract or option led the Government to adopt a definite program of acquisition by

contract. In 1940 the Lands Division of the Department of Justice published "Federal Eminent Domain." This publication clearly shows that the Government considered such option contracts to be binding as to the "value" of the land. It is significant that it is not said that the contract is binding as to "just compensation." Section 42 of this manual, entitled "Purchase Options and Agreements and Their Effect," sets out the various types of standard forms of option contracts developed by the Government. At page 218 it is said:

> "The agreement, when made in contemplation of subsequent condemnation proceedings, becomes the measure of **value**, and is binding both on the landowner and on the government. * * *
>
> "* * * it has been held that when the contract authorizes condemnation, **the price agreed upon** binds the owner even though it is not specifically provided that it shall have any effect in a condemnation proceeding."

Section 42-C of this manual, entitled "Procedure in enforcing option price in subsequent condemnation suit," instructs Government representatives what they should do in order to enforce such contracts, admonishing them that "the Government must insist upon its right to enforce the option." Sections 34-39 set out the administrative routine followed in securing options. **It is significant that this manual calls attention to the fact** (p. 110) **that where payment is made subsequent to the taking, interest must then be paid as a portion of just compensation.**

"Federal Eminent Domain" was published shortly before the acquisition of the option and contract by the Government in the instant case. It clearly establishes that the Government entered into such contracts as an exercise of its eminent domain powers, that such contracts were a step in the condemnation procedure, that both parties to such

contracts were bound as to the agreed value in subsequent condemnation proceedings, and that if there was a delay in payment the owner would be entitled to interest in addition to the value of the land. This administrative interpretation is to be accorded some weight. It shows that from the very outset the Government was acquiring this land by means of condemnation. The terms of the contract (R. 149-151) leave no doubt about it. But the Government repudiated the contract and never acquired title pursuant to it. Instead the Government acquired title by instituting and prosecuting an adversary condemnation proceeding under the Declaration of Taking Act. It was the Government (after the decision of this Court in Muschany v. United States, 324 U. S. 49) that moved (R. 154) the District Court to enter judgment in accordance with the contract. The judgment was entered on the Government's motion.

The Circuit Court of Appeals below completely failed to recognize the true nature of this proceeding. It held that no interest was allowable in the instant case, because "the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled * * * by the terms of the purchase contract." The Court said (R. 302):

> "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract. * * *
>
> "The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, cannot justify the award of interest not required by the contract. In the absence of a statute or an express contract providing for it,

> interest can not be added to an obligation of the United States. * * * The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in payment of an obligation. '* * * interest does not run upon claims against the Government even though there has been a default in the payment of principal.' Smyth v. United States, 302 U. S. 329, 353."

This contention that the nature of a condemnation proceeding is converted into an action in contract so as to avoid the requirements of the Fifth Amendment and the condemnation statutes has been presented to this Court before and this Court has rejected the contention.

We have already pointed out (Point III) that in Danforth v. United States, 308 U. S. 271, this Court held, in an action commenced under a condemnation statute where the landowner stood on a contract fixing the price of the land, that the jurisdiction of the Court depends upon the language of the condemnation statute invoked by the condemnor and not upon the Tucker Act. While this Court held that by reason of the terms of the statute controlling that case there was no taking until the payment of the award and therefore no interest was due, this Court also cited the Declaration of Taking Act as an example of where Congress has by statute defined the doing of a specific thing as the determination of taking from which interest runs. The instant case presents precisely such a situation under the Declaration of Taking Act and under the terms of that Act on the facts here presented the landowner is entitled to interest.

Even in a situation where the Government does not institute condemnation proceedings and the landowner is forced to resort to the Tucker Act, this Court has held that interest is included in the right to just compensation. This was the situation in Jacobs v. United States, 290 U. S. 13,

where a Circuit Court of Appeals on authority of United States v. North American Transp. & Trading Co., 253 U. S. 330, held that the suit was on implied contract and interest was not allowable. This Court reversed and held that the North American Transp. & Trading Co. case was not applicable because it was not founded upon the Fifth Amendment, and that instead in suits founded on the Fifth Amendment the landowner "is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount to be added.'"

Nor, as stated by the Circuit Court of Appeals below, does there have to be a statute or an express contract provision for interest in order that interest be paid in a condemnation proceeding. As said by this Court in Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 304-305:

> "The owner's right does not depend on contract, express or implied. A promise to pay is not necessary."

In Jacobs v. United States, 290 U. S. 13, 16-17, this court said:

> "The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary * * *' **the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest** where such an allowance was appropriate in order to make the compensation adequate."

Moreover, since the condemnation statute invoked by the United States, which is the Declaration of Taking Act, controls the jurisdiction of the Court, Danforth v. United

States, supra, and since the Declaration of Taking Act specifically provides for interest, there is a clear statutory requirement of interest. This was entirely ignored by the Circuit Court of Appeals.

It should be observed that the reason assigned by the Circuit Court of Appeals as to why the adversary condemnation proceedings were "converted" into an action on contract is not an accurate statement of fact. The Circuit Court of Appeals stated (R. 302) that the landowners "by their successful defense of the validity of the purchase contract" converted the cause of action. The petitioner herein did nothing more than allege in the answers to the petition in condemnation and the motion by the Government that the contract was valid and that the value was fixed by it (R. 143, 156). This is nothing more than the landowner did in Danforth v. United States, supra. This issue was not tried by the Government. It was the Government, after this Court had definitely settled the validity of such a contract in Muschany v. United States, 324 U. S. 49, which voluntarily moved (R. 154) the District Court that such contract was valid and binding, and that the District Court fix the just compensation at the agreed value. There was thus no dispute as to the validity and binding nature of the contract. Certainly under these circumstances it could not correctly be stated that there was a "successful defense." But even if there had been a dispute which was litigated, the establishment of the price of the land at the time of the taking by the successful defense of an agreed valuation would still not constitute a conversion which would preclude the payment of interest. Danforth v. United States, supra.

Here, as in United States v. Baugh, 149 F. (2d) 190:

> "The stipulation merely had the effect of relieving the Government from having to make proof as to what

was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Having taken the position that the proceeding was one on contract the Circuit Court of Appeals below stated:

> "The allowance of interest upon the consideration stipulated in the purchase contract would be **tantamount** to awarding interest against the United States by way of damages for delay in the payment of an obligation. '* * * interest does not run upon claims against the Government even though there has been a default in the payment of the principal.' Smyth v. United States, 302 U. S. 329, 353."

The Circuit Court of Appeals has unquestionably confused the nature of these condemnation proceedings and the nature of a suit on an obligation of the United States. Smyth v. United States, 302 U. S. 329, was not concerned with a factual situation at all comparable with the facts here presented. The Circuit Court of Appeals recognized that the facts here involved do not actually present a situation where interest would constitute damages for delay in the payment of an obligation because it uses the word "tantamount"—which means that it is not the same, but is "equivalent in value." Moreover, the Circuit Court of Appeals' reliance on the quoted sentence of Smyth v. United States, supra, leads it to ignore the repeated distinctions drawn by this Court between condemnation proceedings and other types of proceedings. Thus in United States v. North American Transp. & Trading Co., 253 U. S. 330 (cited and relied upon in Smyth v. United States, supra), a landowner brought a suit on an implied contract in the Court of Claims and sought interest. This

Court in holding that interest was not allowable on the facts in that case point out (l. c. 337), nevertheless, that **interest could be collected "as a part of just compensation in condemnation proceedings brought by the government. For such a proceeding * * * is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land."** The facts of the instant condemnation case certainly bring it within the situation where interest is constitutionally required and not within the situation where it is not allowable. This Court has repeatedly pointed out that United States v. North American Transp. & Trading Co., supra, was not a condemnation proceeding and that while interest was not allowed there, it is allowable in condemnation proceedings. Thus in Jacobs v. United States, supra, this court in holding interest allowable said, 290 U. S. 13, 18:

> "The case of United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 S. Ct. 518, supra, cannot be regarded as establishing a different rule for the instant case. See Seaboard Air Line R. Co. v. United States, supra (261 U. S., p. 305, 676 L. ed. 669, 43 S. Ct. 354); Phelps v. United States, supra (274 U. S., pp. 343, 344, 71 L. ed. 1084, 1085, 47 S. Ct. 611). The North American Transp. & Trading Co. case rested upon its special facts. * * * The court said that the suit was not founded upon the Fifth Amendment. 253 U. S., pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point."

In United States v. Rogers, 255 U. S. 163, 169, where the landowners, after order had been entered on the award, moved for a supplementary order requesting the payment of interest, this Court said:

"* * * In the present case the landowners did not sue upon a claim against the government, as was the fact in United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, Sup. Ct. Rep. 518. The government was seeking for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran."

In Seaboard Air Line R. Co. v. United States, 261 U. S. 299, where the Government contended that interest was not allowable because there was not provision in respect to interest, this Court said:

"In support of its contention the government cites United States v. North American Transp. & Trading Co., 253 U. S. 330, 64 L. ed. 935, 40 Sup. Ct. Rep. 518. That case does not sustain its contention. That was a suit in the court of claims, based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it, adopted by the conformity provisions."

And in Shoshone Tribe v. United States, 299 U. S. 476, this Court observed that given the taking, the right to interest "attaches itself automatically to the right to an award" and the North American Transp. & Trading Company case was distinguished as resting "upon its special facts."

As previously discussed (Point I) the use of the term "interest" undoubtedly contributed to the Circuit Court of Appeals' erroneous conclusion. It interpreted "inter-

est" literally, instead of considering it, as it is, a measure to ascertain the amount to be added as a portion of just compensation. Moreover, the use of the "implied contract" theory which has been utilized in some of the Tucker Act proceedings has allowed some confusion to creep in as to the proper basis of the right to just compensation. While the Tucker Act expressly permits suits against the United States based upon a constitutional right, there have been occasions when the recovery was based on the implied contract theory. See United States v. Lynah, 188 U. S. 445 (Note that White, Fuller and Harlan, JJ., dissented and that Mr. Justice Brown, with Shiras and Peckham, JJ., joining, wrote a concurring opinion which would rest jurisdiction solely on constitutional grounds). As observed by one commentator (Marcus, "The Taking and Destruction of Property Under a Defense and War Program," 27 Cornell L. Q. 317, 510), this implied contract theory has "led to strange results as to the right to interest." If the decision of the Circuit Court of Appeals had been made before the author wrote that observation, he would have unquestionably footnoted the observation with a citation to that decision. It must be observed that in such condemnation cases as Jacobs v. United States, Phelps v. United States and other cases discussed supra, this Court has rested the right of recovery directly on the Constitution. Those cases are controlling here.

Lower Federal Court cases also demonstrate that "interest in such a condemnation proceeding is not interest on an obligation of the United States." (See cases cited in Point I.)

The case of Holley v. United States (C. C. A. 6th, 1942), 124 F. (2d) 909, is pertinent. There the landowner and the City of Detroit had entered into a written agreement before condemnation was completed that the City would

pay the award in ten equal installments with interest on unpaid balance. The landowner contended that the interest payments were exempt from taxation because it was interest on the obligation of the city. The court rejected this contention because such "interest" was a portion of just compensation required by the Constitution in condemnation where the taking preceded payment.

In United States v. McIntosh, 2 F. Supp. 244, the Court of Claims had refused to allow interest. Because the landowner had failed to appeal from this ruling it was held that he was precluded from subsequently recovering interest, but the Court said (2 F. Supp. 244, 255):

> "Defendant's counsel also contends that the landowner in the McIntosh case is not estopped by acceptance of payment of the judgment of the Court of Claims, because the amount of the judgment did not constitute just compensation, in that, although it determined the value of the land as of the time of taking, it did not include compensation by way of interest or otherwise for the period between the time of taking and full payment. In refusing to include this element of just compensation, the Court of Claims acted on the theory that interest could not be allowed on claims against the Government without express statutory authority, which was not given by the Act of July 1, 1918, **thus apparently erroneously overlooking the consideration that in such cases the allowance of interest between the time of taking and full final payment is not the allowance of interest as such, but is simply one element of just compensation,** as has since been expressly decided by the Supreme Court in Phelps v. United States, 274 U. S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083, and Seaboard Air Line R. Co. v. United States, 261 U. S. 304, 43 S. Ct. 354, 67 L. Ed. 664."

See also, Thayer-West Point Hotel Co. v. United States,

64 F. Supp. 565, where the action was definitely based on a contract, a lease. While neither the contract nor the statute mentioned interest, both required the payment of just compensation. The Court of Claims allowed interest saying at l. c. 568:

> "The suit here is on a contract and not for condemnation under the Fifth Amendment. Section 177 of the judicial code, 28 U. S. C. A., § 284, prohibits this Court from allowing interest 'unless upon a contract expressly stipulating for the payment of interest.' But the Supreme Court has held that interest, so-called, necessary to build compensation up to a point where it can be considered just as of the date of payment, is not interest within the meaning of Section 177 of the Judicial Code. Phelps v. United States, 274 U. S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083.
>
> "Both statute and contract expressly provide for the payment of 'just compensation'. The compensation payable must be no less just than that payable under the Fifth Amendment. There is no plausible distinction."

Under the facts of this case and the foregoing body of law, it is submitted that the Circuit Court of Appeals erroneously conceived this adversary condemnation proceeding to be converted into an action on contract which would preclude the payment of "interest". Instead, "interest" as a measure of just compensation for the time the landowner was denied both the use of the land and its money equivalent is required by the Fifth Amendment and the Declaration of Taking Act.

CONCLUSION.

For the reasons stated, the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A.

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be • • • deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

The pertinent portion of the Declaration of Taking Act, 40 U. S. C. A., Sec. 258a, is as follows:

> "Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."

The pertinent portion of the Tucker Act, 28 U. S. C. A., Sec. 41 (20), is as follows:

> "Sec. 41. The district courts shall have original jurisdiction:
>
> • • • • • • •

"(20) Suits against the United States concurrent with the court of claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in court of law, equity or admiralty, if the United States were suable. * * *"

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ...

DENNIS B. PITMAN and MAY DELL PITMAN,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. [redacted] 150

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

WILLIAM H. ALLEN,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ...

DENNIS B. PITMAN and MAY DELL PITMAN,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.
No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now Dennis B. Pitman and May Dell Pitman, his wife, and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for

the Eighth Circuit rendered and entered on the 9th day of April, 1946, in this case, lately pending in said Court of Appeals entitled United States of America, Appellant, v. Dennis B. Pitman and May Dell Pitman, Appellees, No. 13228 on the docket of said Court of Appeals, reversing a judgment of the United States District Court for the Eastern Division of the Eastern District of Missouri (Division 1, presided over by Hon. George H. Moore, District Judge) in said cause in favor of your petitioners and against respondent, United States of America, with directions; said opinion of the Court of Appeals being a memorandum opinion (R. 295) wherein that Court referred to its opinion in the companion case of Oliver et al., Appellants, v. United States of America, Appellee, No. 13174 in said Court of Appeals, as stating the reasons for the entry, on the same day, of its said judgment in this cause (R. 306).

OPINIONS OF THE COURT BELOW.

The said memorandum opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this cause, entitled United States of America, Appellant, v. Dennis B. Pitman and May Dell Pitman, Appellees, appears on pages 295 and 296 of the printed transcript of the record filed herewith; and the opinion of said Court of Appeals in said cause of Oliver et al., Appellants, v. United States of America, Appellee, referred to by the Court in its said memorandum opinion in this cause, appears at pages 296 to 303, inclusive, of said printed transcript of the record. Said opinions have not as yet been published.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On November 7, 1940, these petitioners being the owners of certain lands in St. Charles County, Missouri, signed and delivered to respondent a written option (R. 237) whereby they agreed to sell and convey said lands to respondent, referred to therein as the Government, free and clear of liens and encumbrances, for the price and consideration of $35,000.00. Said written option further provided as follows:

> "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

Thereafter, on the 14th day of November, 1940, said option was duly accepted by respondent, United States of America, and became a binding contract between the parties (R. 242), and is hereinafter referred to as the "option contract." Thereafter, on the 19th day of June, 1941, no part of said price or consideration provided by said contract to be paid to these petitioners having been paid by respondent, respondent instituted this proceeding, a condemnation suit, in the United States District Court for the Eastern Division of the Eastern District of Missouri, making petitioners parties defendant, for the condemnation of said lands, by the filing by respondent of a petition in condemnation (R. 204-216, inclusive), describing said

lands and praying among other things, that the defendants therein and each of them be divested of all right, title and interest in and to said lands and that the title thereto in fee simple be vested in the plaintiff (this respondent) and that the court immediately make an order to that effect pursuant to the Act of Congress approved February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a (R. 215). On the same day respondent, as plaintiff in this condemnation suit, filed in said District Court a Declaration of Taking, declaring that the lands were taken under and in accordance with said Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a, and other Acts of Congress therein mentioned (R. 217); said Declaration of Taking reciting that the estimated compensation for the taking of said lands was $14,600.00. And on the same day said District Court, at the instance of respondent, entered its Order and Judgment on Declaration of Taking (R. 221-227, inclusive), describing said lands, ordering and adjudging that "said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law." And on the same day respondent caused to be deposited in the registry of said District Court the said sum of $14,600.00 as the estimated compensation for the taking of said lands (R. 227).

Thereafter, on the 3rd day of September, 1941, within the time allowed therefor by said District Court, these petitioners, Dennis B. Pitman and May Dell Pitman, filed their answer to said petition in condemnation (R. 228-242, inclusive), wherein petitioners pleaded said option contract and alleged that they were entitled thereunder to have the award in the condemnation proceeding fixed at the sum

of $35,000, the valuation agreed upon in said contract, and prayed that the court, by its judgment, order and decree, so fix said award, require respondent pay the balance thereof into the registry of the court, and for interest.

No further proceedings were had in this case (except orders and matters relating to the distribution of the said sum of $14,600.00 deposited in the registry of the court) until after the decision of this Honorable Court in Muschany v. United States and Andrews v. United States, 324 U. S. 49, 65 S. Ct. 442, being companion cases to this case, involving the same option contract, which cases were appealed to the United States Circuit Court of Appeals for the Eighth Circuit and reached this Court on certiorari and were decided by this Court on February 5, 1945, and wherein this Court held the option contracts to be valid and that each operated to fix the amount of the award in each proceeding at the amount agreed upon in option contract.

Thereafter, on April 17, 1945, respondent, as plaintiff in this condemnation suit, filed in said District Court a motion for judgment for the plaintiff therein in condemnation, and for the defendants (these petitioners) fixing the total compensation to be paid by respondent for the taking of said lands at said sum of $35,000.00, without interest (R. 243, 244); and thereafter, on May 4, 1945, petitioners filed their answer to respondent's said motion, together with their counter-motion praying that the Court by its judgment fix the compensation to be paid by respondent for the taking of said lands at said sum of $35,000.00 plus interest on said deficiency of $20,400.00 which had not been paid into the registry of the court, at six per cent. per annum from and after June 19, 1941, the date of the filing of said Declaration of Taking, and praying that the court require respondent to pay into the registry of the court said sum of $20,400 with interest as aforesaid.

Thereafter, during the pendency of said motion, to wit,

on May 17, 1945, respondent paid said deficiency of $20,400 into the registry of said court in this cause, No. 997 in said District Court (R. 247, 248).

And thereafter, on June 8, 1945, said District Court rendered and filed its opinion in this cause and other companion condemnation proceedings pending in said Division No. 1 of said District Court, involving the same option contract and the same questions (R. 249-267, inclusive); and, pursuant to said opinion said District Court, on June 30, 1945, made and entered its "Findings and Judgment" in this cause (R. 267-276, inclusive), awarding respondent judgment in condemnation against the lands and adjudging that the title thereto in fee simple absolute be vested in respondent (R. 275), and awarding these petitioners said sum of $35,000.00 as and for the agreed value of said lands as of the date of the filing of said Declaration of Taking, with interest on said deficiency of $20,400.00 at six per cent. per annum from said June 19, 1941, until May 17, 1945, amounting to $4787.20, adjudging that said sum of $35,000.00 and said interest should constitute the full just compensation for said lands, and ordering that respondent forthwith pay said sum of $4787.20 into the registry of the court (R. 276).

Thereafter, respondent, on July 7, 1945, filed in said District Court its motion for a new trial (R. 277), which was overruled on November 21, 1945 (R. 282), and thereafter, in due course, appealed this cause to the United States Circuit Court of Appeals for the Eighth Circuit, where said appeal was perfected and the cause was, on the 8th day of March, 1946, argued by counsel and submitted upon said argument and briefs of counsel and was taken under advisement by the court (R. 292, 293). Thereafter, on April 9, 1946, said Court of Appeals filed its said memorandum opinion in this cause (R. 295) and entered its judgment herein reversing the judgment of said District Court therein and remanding said cause (R. 306), and on

the same day filed its opinion in said cause of Oliver et al. v. United States, No. 13174 in said Court of Appeals (R. 297-303), to which opinion said Court of Appeals referred in its said memorandum opinion in this cause as stating the reasons for its said ruling and judgment in this cause.

Thereafter, on the 22d day of April, 1946, and within the time allowed therefor by the rules of the Court of Appeals, petitioners duly filed in this cause in said Court of Appeals, their petition for a rehearing of this cause (R. 343-347), which petition for a rehearing was, on the 30th day of April, 1946, denied by said Court of Appeals (R. 349), on which day said judgment of said Court of Appeal in this cause became final.

The duly certified record, including all of the proceedings in this cause in said District Court and in said Court of Appeals is filed herewith under separate cover, together with the requisite number of printed copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Courts of Appeals. The judgment of the United States Circuit Court of Appeals for the Eighth Circuit here sought to be reviewed was entered on April 9, 1946 (R. 306). A petition for a rehearing was duly filed by these petitioners, appellees in said Circuit Court of Appeals, on April 22, 1946, within the time provided by the rules of said Circuit Court of Appeals (R. 343-347), and said petition for a rehearing was denied by said Circuit Court of Appeals on April 30, 1946 (R. 349). Among the cases thought to sustain the jurisdiction are:

Muschaney v. United States, 324 U. S. 49;
Danforth v. United States, 308 U. S. 271.

QUESTIONS PRESENTED.

The questions presented by petitioners' petition herein for a writ of certiorari are:

(1) Whether, in this condemnation suit instituted by respondent against petitioners as landowners under the Declaration of Taking Statute (Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a) for the condemnation of the lands described in the petition (R. 204), these petitioners are entitled to interest on that portion of the amount finally awarded as the value of the property as of the date of taking which was not paid into court at the time of the taking by the filing of the declaration, where prior to the institution of the suit petitioners and respondent had entered into a written contract for the sale of said lands to respondent for the price of $35,000.00 (R. 237), wherein it was agreed that if respondent should institute proceedings to acquire title to the lands by condemnation the award therein should be fixed at the agreed valuation named in said contract and forthwith paid into court, but respondent, in attempted repudiation of the contract, deposited in court only $14,600.00 upon the institution of this suit, prayed for the appointment of commissioners to fix the award, and litigated the question of the validity of the contract until this Court, in companion cases, had held that the contract was valid and operated to fix the proper condemnation award, and did not pay the balance of said agreed award into court until nearly four years after the taking.

(2) Whether the Court of Appeals, by its opinion and judgment in this cause (R. 295, 306), rendered and entered for the reasons stated by that Court in its opinion in the companion case of Oliver et al. v. United States of America (R. 296), denied petitioners a right to which they are law-

fully entitled under the Declaration of Taking Statute (Act of Congress approved February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., sec. 258a); the right, specifically set up and claimed by them, to have the judgment herein include, as a part of just compensation, interest on that portion of the amount finally awarded as the value of the property as of the date of taking which was not paid into court by respondent until nearly four years after the taking by the filing of the declaration of taking.

(3) Whether the ruling and judgment of the Court of Appeals in this cause (R. 295, 306), made and entered for the reasons stated by that court in its opinion in the companion case of Oliver et al. v. United States of America (R. 296), denying these petitioners any interest on that part of the amount finally awarded as the value of the property at the time of the taking that was not paid into court by respondent until nearly four years after the taking by the filing of the declaration of taking, operates to allow respondent to take the private property of petitioners for a public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) Since in this condemnation suit, brought under the Declaration of Taking Statute (Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., sec. 258a), there was a taking of the title to the property on June 19, 1941, by the filing by respondent of a declaration of taking, and the amount finally awarded petitioners as for the value of the property at the time of the taking was $35,000.00, but respondent, on said June 19, 1941, paid into court only $14,600.00 and did not make the deficiency of $20,400.00 available to

petitioners until May 17, 1945, petitioners are entitled to interest on said deficiency from June 19, 1941, to May 17, 1945, at six per cent. per annum; and the decision of the Court of Appeals to the contrary is erroneous, violative of said statute, and in conflict with applicable decisions of this Court holding that where there has been a taking or appropriation of the private property of a citizen for a public use without the payment in full of the amount of a subsequent award of damages as for the value of the property at the time of the taking, the right of the owner to interest, or a fair equivalent, automatically attaches itself to such award, among which are:

Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13, 16;
Seaboard Air Line Railway Co. v. United States, 261 U. S. 299;
United States v. Rogers, 255 U. S. 163.

(2) The decision of the Court of Appeals holding that petitioners are not entitled to interest, though the major portion of the final award, as for the value of the property at the time of the taking, fixed pursuant to the prior agreement of the parties, was not paid into Court until long after the taking, is erroneous and in conflict with the applicable decisions of this Court holding that wherever private property of a citizen is taken by the Government for public use the owner is not limited to the value of the property at the time of the taking, but is entitled, as a part of just compensation, to such additional sum as will produce the full equivalent of that value paid contemporaneously with the taking, among which are:

Jacobs v. United States, 290 U. S. 13, 16;
Phelps v. United States, 274 U. S. 341;
Liggett & Myers Co. v. United States, 274 U. S. 215;
Brooks-Scanlon Corp. v. United States, 265 U. S. 106.

(3) The decision of the Court of Appeals that petitioners are not entitled to interest, though the major portion of the amount finally awarded them as the value of the property at the time of the taking was withheld by respondent from the registry of the court for nearly four years, on the theory that the purchase price named in the option contract entered into by the parties prior to the institution of this suit, which became the amount of such award, constituted the agreed equivalent of just compensation, is erroneous and in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in a case wherein that court sustained the landowners' right to interest upon the amount agreed upon as compensation, for the period that same was thereafter withheld from the registry of the court, namely:

United States v. Baugh, 149 Fed. (2) 190.

(4) The decision of the Court of Appeals that petitioners are not entitled to interest, though the major portion of the amount finally awarded them as the value of the property at the time of the taking was withheld by respondent from the registry of the court for nearly four years, on the theory that petitioners, by successfully insisting upon the validity of the option contract as fixing the proper condemnation award, converted this case from a condemnation suit into one controlled, as to the amount recoverable, by the terms of the contract and hence the allowance of interest would be tantamount to allowing interest on a contract obligation of the United States not providing for interest, is erroneous and in conflict with the decisions of this Court in

Muschany and Andrews v. United States, 324 U. S. 24;

Danforth v. United States, 308 U. S. 271.

(5) The Court of Appeals, by its decision in this cause,

holding and deciding that petitioners are not entitled to interest on that portion of the amount finally awarded them as the value of the property at the time of the taking which was not paid into court for nearly four years after the taking, has denied petitioners a right, specifically set up and claimed by them, to which they are lawfully entitled under the Declaration of Taking Statute (Act of February 26, 1931, 46 Stat. 1421, 40 U.S. C. A., sec. 258a) and the right, as well, to just compensation for the taking of their property vouchsafed to them by the Fifth Amendment to the Constitution of the United States. It is respectfully submitted that the denial to petitioners of such rights plainly calls for the issuance by this Court of its writ of certiorari.

(6) The question of the right of landowners to interest under like circumstances is involved in numerous other cases growing out of the acquisition by the United States of a large tract of land near Weldon Spring in St. Charles County, Missouri, for use as a location for a Government ordnance plant. It is a matter of public and far reaching importance. It is a question that has not been determined by this Court, and should be settled by this Court. And the decision of the Court of Appeals herein, being in conflict with a decision of another Court of Appeals, would, if permitted to stand, serve only to bring about conflict of decision and confusion in the law. It is therefore respectfully submitted that this Court's writ of certiorari should issue herein.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that said opinion and judgment of said Court of

Appeals in said cause of United States of America, Appellant, v. Dennis B. Pitman and May Dell Pitman, Appellees, No. 13228 in said Court of Appeals, be reviewed by this Court, as provided by law, and that, upon such review, said judgment of said Court of Appeals be reversed, and that petitioners have such other relief as this Court may deem appropriate.

Respectfully submitted,

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WILLIAM H. ALLEN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in said cause of United States of America, Appellant, v. Dennis B. Pitman and May Dell Pitman, Appellees, which petitioners here seek to have reviewed, appears on page 306 of the printed transcript of the record filed herewith; and the opinion of that court in Oliver et al. v. United States of America, referred to by the court in its opinion in this cause as stating the reasons for its opinion and judgment herein appears on pages 296 to 303, inclusive, of said printed transcript.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioners' petition for a writ of certiorari herein, and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Eighth Circuit in its opinion in this cause (R. 306) and in its opinion in Oliver et al. v. United States (R. 296-303) to which the court referred in its opinion herein as stating the reasons for its decision in this case, erred:

(1) In holding and deciding that petitioners are not entitled to interest on that portion of the amount finally awarded them in this condemnation suit as for the agreed

value of their property at the time of the taking which was not paid into court by respondent at the time of the filing of the declaration of taking, but which was withheld by respondent from the registry of the court for nearly four years.

(2) In holding and deciding that the purchase price fixed by the option contract entered into between the parties prior to the institution of this condemnation suit constituted the agreed equivalent of just compensation for the taking of the lands by condemnation, though the major portion thereof was withheld from the registry of the court for nearly four years.

(3) In holding and deciding that the landowners, by their successful defense of the validity of the option contract, converted the condemnation suit into one controlled as to the amount of their recovery by the terms of the option contract.

(4) In holding and deciding that the allowance of interest would be tantamount to awarding interest against the United States on a contract obligation not providing for interest.

(5) The decision of the Court of Appeals deprives petitioners of their right to interest under the terms of the very statute (Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., sec. 258a) under which respondent brought this suit and filed its declaration of taking, and their right to just compensation under the Fifth Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

I.

Since there was a taking of petitioners' property prior to the payment in full of the amount finally awarded them in the condemnation proceeding as the agreed value of the land at the time of the taking, respondent is liable for interest on so much of that award as was not paid by it into the registry of the court at the time of the taking by the filing of the declaration of taking, from that time and until the same was made available to petitioners.

Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13, 16;
Seaboard Air Line Railway Co. v. United States, 261 U. S. 299;
Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123;
United States v. Rogers, 255 U. S. 163.

(1)

Wherever there has been a taking or appropriation by the Government of private property for a public use, the right to interest, or a fair equivalent, on so much of a subsequent award of damages as was not paid or made available to the owner at the time of the taking attaches itself automatically to such award.

Shoshone Tribe of Indians v. United States, 299 U. S. 476, 497;
Jacobs v. United States, 290 U. S. 13, 16;
Seaboard Air Line Railway Co. v. United States, 261 U. S. 299.

(2)

The owner is not limited to the value of the property at the time of the taking, but is entitled, as a part of just compensation, to such additional sum as will produce the full equivalent of that value paid cotemporaneously with the taking.

Jacobs v. United States, 290 U. S. 13, 16;
Phelps v. United States, 274 U. S. 341;
Liggett & Myers Co. v. United States, 274 U. S. 215;
Brooks-Scanlon Corp. v. United States, 265 U. S. 106.

(3)

And by the express terms of the statute under which this condemnation suit was brought, petitioners are entitled to interest, at six per cent. per annum, on that part of the amount finally awarded as the value of the land as of the time of the taking by the filing of the declaration of taking that was not paid into court at the time of such taking.

Act of February 26, 1931, 46 Stat. 1421 (40 U. S. C. A., Sec. 258a).

II.

The ruling of the Court of Appeals that petitioners are not entitled to interest on that portion of the amount finally awarded as the value of the property at the time of the taking that was withheld from the registry of the court for nearly four years, on the theory that the purchase price named in the prior option contract, which became the amount of such final award, constituted the agreed equivalent of just compensation, is manifestly unsound and in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in:

United States v. Baugh, 149 Fed. (2) 190.

(1)

The contract previously entered into between the parties performed, in this suit, the function merely of fixing the condemnation award, as for the value of the property at the time of the taking, at the agreed valuation named in the contract.

Muschany v. United States and Andrews v. United States, 324 U. S. 49;
Danforth v. United States, 308 U. S. 271.

III.

The ruling of the Court of Appeals that the landowners, by successfully insisting upon the validity of the contract, converted this case from a condemnation suit into one controlled as to the amount recoverable by the terms of the contract, and that thence to allow interest would be tantamount to allowing interest on a contract obligation of the United States not providing for interest, is also plainly unsound.

(1)

The suit could not thus be converted into something other than that which the record throughout shows it to be. It remained a conventional, statutory, condemnation suit; one in which the condemnation award, as for the value of the property at the time of the taking, had been fixed by agreement of the parties.

Muschany v. United States and Andrews v. United States, 324 U. S. 49;
Danforth v. United States, 308 U. S. 271.

(2)

And the rule that interest does not run upon a claim against the United States in the absence of a contract or statute evidencing a contrary intention was not violated

by the District Court in allowing the interest claimed by petitioners. Interest was claimed and allowed, not on the contract, but under the terms of the statute under which the condemnation suit was brought, and as constituting a part of the just compensation guaranteed petitioners by the Fifth Amendment to the Constitution of the United States. The right to interest is neither found in nor lost by the contract.

United States v. Baugh, 149 Fed. (2) 190.

IV.

And petitioners' claim to interest, though not based on the contract, is in no wise inconsistent therewith, since the contract implied, as a matter of law, that if respondent should resort to condemnation and should not pay the full agreed valuation into court upon the institution of the suit, petitioners would be entitled to interest in accordance with the law of the land applicable to condemnation proceedings. The law of the land is read into every contract and becomes an integral part thereof.

Farmers and Merchants Bank of Monroe v. Federal Reserve Bank, 262 U. S. 649;
McCullough v. Virginia, 172 U. S. 102, 124;
Ogden v. Saunders, 25 U. S. (Wheat. 12) 213;
United States v. Baugh, 149 Fed. (2) 190;
17 C. J. S. 782;
12 Amer. Jur. 769, sec. 240.

ARGUMENT.

Since there was a taking of petitioners' property prior to the payment in full of the amount finally awarded them in the condemnation proceeding as the agreed value of the land at the time of the taking, respondent is liable for interest on so much of that award as was not paid by it into the registry of the court at the time of the taking by the filing of the declaration of taking, from that time and until the same was made available to petitioners.

Though respondent, by the option contract entered into between the parties in November, 1940 (R. 237), agreed to pay petitioners the purchase price named therein, to-wit, $35,000.00, and immediately took possession of the lands (R. 269), respondent paid petitioners no part of said contract price, but attempted to repudiate the contract, and on June 19, 1941, instituted, in the District Court, this condemnation suit under the Declaration of Taking Statute (Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A. sec. 258a), by the filing of its petition and declaration of taking. And though the contract expressly provided that if respondent should proceed to acquire title to the lands by condemnation, the condemnation award should be fixed at the agreed valuation named in the contract (R. 242), respondent, upon filing the suit, paid into court only $14,600.00, and prayed for the appointment of Commissioners to fix the award. It was not until after the decision of this Court in the companion cases of **Miuschany v. United States and Andrews v. United States, 324 U. S. 49**, sustaining the validity of such option contracts and holding that each served to fix the condemnation award at the agreed valuation, that respondent, on May 17, 1945, paid into court the deficiency of $20,400.00. And then respondent, having utilized the statute aforesaid for its purposes, and having reaped the benefits flowing to it therefrom,

sought to avoid the payment of interest as required by its terms. But the District Court, in conformity with its opinion (R. 249), which, we submit, is thoroughly sound and unassailable, entered judgment awarding petitioners $35,000.00 as for the agreed value of the land as of the date of the declaration of taking, together with interest on said $20,400.00, at six per cent, for the period of nearly four years that the same had been withheld from the registry of the court (R. 267). It is respectfully submitted that, upon this record, that judgment is entirely proper, and that the Court of Appeals grieviously erred in reversing it.

The pertinent provisions of the Declaration of Taking Statute (Act of February 26, 1941, 46 Stat. 1421, 40 U. S. C. A. sec. 258a) are as follows:

> "Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute * * * shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."

That there was a taking of the lands, within the contemplation of the statute, by the filing of said declaration of taking and the entry of judgment of taking thereon,

cannot be denied. The absolute, fee simple title to the lands became thereby vested in respondent, and the claims of all persons whomsoever thereto were transferred from the land to the funds paid or to be paid into court. But since respondent, at the institution of the suit, paid into court only approximately forty per cent. of the amount of the final award as for the value of the property at the time of the taking, by the express terms of the statute petitioners are entitled to the interest awarded them by the District Court.

The statute is declaratory of the constitutional right of an owner not to have his property taken for a public use without just compensation. It is fundamental that wherever private property is taken by the United States for a public use, the owner's right to interest, or a fair equivalent, on so much of the subsequent award of damages as was not paid or made available to him at the time of the taking, automatically attaches itself to such award. Shoshone Tribe of Indians v. United States, 299 U. S. 476; Jacobs v. United States, 290 U. S. 13; Seaboard Air Line R. Co. v. United States, 261 U. S. 299; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; United States v. Rogers, 255 U. S. 163. The owner is not limited to the value of the property at the time of the taking, but is entitled, as a part of the just compensation guaranteed to him by the Fifth Amendment to the Constitution of the United States, to such additional sum as will produce the full equivalent of that value paid cotemporaneously with the taking. Jacobs v. United States, 290 U. S. 13; Phelps v. United States, 274 U. S. 341; Liggett & Myers Co. v. United States, 274 U. S. 215; Brooks-Scanlon Corp. v. United States, 265 U. S. 106.

In **Shoshone Tribe of Indians v. United States, 299 U. S. 476**, where, as a result of the breach of treaty stipulations, the Shoshone Tribe had been excluded by the Government from the possession and enjoyment of an undivided one-

half interest in the tribal lands, constituting an appropriation of property within the meaning of the Fifth Amendment, this Court (299 U. S., l. c. 497) said:

> "**Given such a taking, the right to interest or a fair equivalent attaches itself automatically to the right to an award of damages.** Jacobs. v. United States, supra; Phelps v. United States (274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123; Seaboard Air Line Co. v. United States, 261 U. S. 299, 306. These cases distinguish United States v. North American Co., 253 U. S. 330, cited by the Government, which 'rested upon its special facts.' Jacobs v. United States, supra." (Emphasis ours.)

In the leading case of **Jacobs v. United States, 290 U. S. 13**, there was a partial taking of the landowners' lands for flowage purposes without condemnation, and they brought suit to recover compensation. As to the right to interest, this Court (290 U. S., l. c. 17), after pointing out that the suits were based on the landowners' right to the just compensation guaranteed by the Fifth Amendment, said:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' **The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.'** Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.' Seaboard Air Line R. Co. v. United States, 261 U. S. 299, 306." (Emphasis ours.)

Such was the law of the land long prior to the enactment of the Declaration of Taking Statute (Act of Febru-

ary 26, 1931, 46 Stat. 1421, 40 U. S. C. A., sec. 258a). And it is the law applicable to the issue involved in this case. The statute is declaratory thereof, fixing the interest rate at six per cent. It provides, in substance, that **the judgment shall include, as a part of just compensation, interest at six per cent per annum on that part, if any, of the amount finally awarded as the value of the property as of the date of taking that was not paid into court at the time of the taking.** It follows that petitioners, in this suit under the statute, are lawfully entitled to interest at six per cent per annum on that part of the amount finally awarded as the value of the property at the time of the said taking that was withheld from the registry of the court for nearly four years.

It is plain, we submit, that the decision of the Court of Appeals herein denying petitioners' right to interest is erroneous, violative of the statute aforesaid, operates to deprive these petitioners of their property without the just compensation guaranteed by the Fifth Amendment to the Constitution of the United States, and is in direct conflict with the decisions of this Court to which we have referred above.

Certainly this is true unless petitioners have in some way waived or forfeited their right to such interest. It is submitted, however, that for the reasons to be hereinafter shown, this record contains nothing to warrant a holding that there was any such waiver or forfeiture.

II.

The ruling of the Court of Appeals that petitioners are not entitled to interest on that part of the amount finally awarded as the value of the property at the time of the taking that was withheld from the registry of the court for nearly four years, proceeds, in part, on the theory that the purchase price named in the prior option contract,

which became the amount of the final award, constituted "the agreed equivalent of just compensation for the taking," whether by condemnation or purchase (R 302). Such ruling in support of which the court cites no authority is, we submit, manifestly unsound. There is nothing whatsoever in the contract evidencing the intention that the contract price should constitute full compensation for the taking of the land in the event that respondent should elect to proceed by condemnation and should not promptly pay into court the full amount of the contract price. **Indeed, the contract evidences precisely the contrary intention.** The contract says nothing about **compensation,** but does provide that, in the event of condemnation, **the agreed valuation** shall constitute the amount of the **award** in the condemnation proceeding. Said ruling of the Court of Appeals evidences, we submit, an entirely erroneous conception by the court of the part played by the option contract after respondent had instituted the condemnation suit. After respondent had repudiated the contract and had instituted its suit to condemn the property, **the contract performed merely the function of fixing the award in that proceeding, as for the value of the property at the time of the taking, at the agreed valuation named in the contract. It performed simply the function ordinarily performed in a condemnation suit by commissioners or a jury.** This plainly appears from the opinion of this Court in Muschany v. United States and Andrews v. United States, 324 U. S. 49, and accords with this Court's opinion in Danforth v. United States, 308 U. S. 271.

And the ruling of the Court of Appeals that the purchase price named in the contract constituted the agreed equivalent of just compensation for the taking, though the major portion thereof was not paid into court in this proceeding until years after the taking, is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in **United States v. Baugh, 149 Fed. (2) 190.**

In the **Baugh case** (149 Fed. [2] 190) a condemnation proceeding was instituted by the United States under the Second War Powers Act (50 U. S. C. A., Sec. 632, Appendix) to acquire a tract of land for military purposes, and an order for immediate possession was entered on the day the suit was filed. Thereafter the owners of the various parcels in the area entered into stipulations with the United States whereby the landowners waived a hearing before commissioners and consented to a decree vesting title in the plaintiff, and the parties agreed upon certain sums as just compensation to be awarded for the taking of their property. Thereafter a delay of about eight months ensued before the plaintiff made deposit of the funds into court. In holding that the United States was liable for interest, the Court of Appeals (149 U. S. [2], l. c. 192) said:

> "The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment. There is no mention in the stipulations that interest was, or was not, included. **Just compensation in condemnation cases means just compensation at the time of taking of possession, and when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner impliedly waived any legal right.**" (Emphasis ours.)

And later on in the opinion (149 Fed. [2], l. c. 193) the Court, referring to the landowners, said:

> "**Their right to have interest is found in the Constitution and is neither found nor lost in the contract.** (Emphasis ours.)
>
> " 'The Constitution no more permits the deprivation of money without just compensation than it does

the deprivation of the use of land without just compensation.'"

The Baugh case cannot be there distinguished on the ground that there the agreement was entered into during the pendency of a condemnation suit, as the Court of Appeals doubtfully suggests (R. 303). The opinion therein evidences a full understanding and appreciation of the fundamental law of the land announced and applied in the opinions of this Court referred to above.

III.

The ruling of the Court of Appeals that the landowners by successfully insisting upon the validity of the option contract, as fixing the proper condemnation award, converted this case from a condemnation suit "into one controlled, as to the amount of their recovery, by the terms of the purchase contract," and that hence to allow the interest claimed by the landowners would be tantamount to allowing interest on a contract obligation of the United States not providing for interest (R. 302, 303), is likewise plainly unsound. **The suit could not thus be converted into something other than that which the record throughout plainly shows it to be. It remained a conventional condemnation suit**; one in which the award as for the value of the property at the time of the taking was required to be fixed in accordance with the agreement of the parties, rather than by commissioners or a jury. Muschany v. United States and Andrews v. United States, 324 U. S. 49; Danforth v. United States, 308 U. S. 271.

And the judgment of the District Court awarding petitioners the interest sought by them in no way does violence to the rule that interest does not run upon a claim against the United States in the absence of a contract or statute evidencing a contrary intention. In this case in-

terest was neither claimed nor allowed on a contract obligation of the United States. It was claimed and properly allowed in a condemnation suit, on that part of the agreed award that was not paid into court at the time of the taking, in conformity with the very statute under which the suit was brought, and as constituting a part of the just compensation guaranteed by the Fifth Amendment to the Constitution of the United States. In such a situation, the right to interest has its foundation in the constitutional guaranty of just compensation and in the statute declaratory thereof. It is not found in nor lost by the prior contract between the parties. United States v. Baugh, 149 Fed. (2) 190, 193.

IV.

And though petitioners' claim to interest is not based upon the option contract, it is in no wise inconsistent therewith, for the contract implied, as a matter of law, that if respondent should resort to condemnation and should not, upon the institution of the suit, pay the full agreed valuation into court as the amount of the agreed award, petitioners would be entitled to interest **in accordance with the law of the land applicable to condemnation proceedings.** The law of the land is read into every contract and becomes an integral part thereof. Farmers and Merchants Bank of Monroe v. Federal Reserve Bank, 262 U. S. 649; McCullough v. Virginia, 172 U. S. 102, 124; Ogden v. Saunders, 25 U. S. (Wheat. 12) 213; United States v. Baugh, 149 Fed. (2) 190; 17 C. J. S. 782; 12 Amer. Jur. 769, sec. 240.

In **Farmers and Merchants Bank of Monroe v. Federal Reserve Bank, 262 U. S. 649, l. c. 660,** this Court said:

> "Laws which subsist at the time and place of the making of the contract, and where it is to be per-

formed, enter into and form a part of it as fully as if they had been expressly referred to or incorporated therein."

In **United States v. Baugh, supra, 149 Fed. (2) 190,** the court, in considering the effect of the stipulations there entered into, on the question of the landowners' right to interest under the law applicable to eminent domain cases, said:

"The settled law of the land at the time the contract is made is a part of the contract and must be read into it."

Petitioners respectfully submit that the situation presented by this record is one calling loudly for interference by this Court to the end that a decision of a Court of Appeals out of harmony with decisions of this Court and with a decision of another Court of Appeals may not be permitted to stand, and that the issue involved herein may be finally resolved in keeping with the law of the land and in consonance with right and justice.

Petitioners therefore pray that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit herein, rendered on April 9, 1946, be reversed.

Respectfully submitted,

.....

WILLIAM H. ALLEN,
Counsel for Petitioners, Dennis B. Pitman and May Dell Pitman.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

A. RAY OLIVER, Executor of the Estate of Lola Castlio Oliver, Deceased, A. RAY OLIVER and B. IRENE CASTLIO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. [redacted] 151

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

A. RAY OLIVER, Executor of the Estate of Lola Castlio Oliver, Deceased, A. RAY OLIVER and B. IRENE CASTLIO, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No.....

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, deceased, who succeeded the said Lola Castlio Oliver as a party (appellant) in a certain proceeding pending in the Circuit Court of Appeals for the Eighth Circuit, by an order entered in said court on the 17th day

of May, 1946, A. Ray Oliver, and B. Irene Castlio, and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered and entered on the 9th day of April, 1946, in a cause entitled Lola Castlio Oliver, A. Ray Oliver, and B. Irene Castlio, Appellants, vs. United States of America, Appellee, designated in that Court as No. 13174 Civil.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit upon which its judgment was entered has not yet been reported but is set out in the Record (R. p. 79).

JURISDICTION.

The jurisdiction of this Court is invoked by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347[a]).

The judgment of which review is sought was entered on April 9, 1946, but did not become final until April 30, 1946, when petitioners' (appellants) Petition for Rehearing was denied (R. p. 100).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The constitutional provision involved is Amendment V to the Constitution of the United States which provides in part "* * * nor shall private property be taken for public use, without just compensation".

The statutory provision involved is 40 U. S. C. A., Sec. 258a, c. 307, Sec. 1, 46 Stat. 1421. This statute is filed herewith as an appendix.

STATEMENT.

The petitioners were the owners of certain land located in St. Charles County, Missouri. On the 24th day of December, 1940, they signed a written offer designated an "Option to Purchase Land" to sell this land to the United States of America for the sum of $70,000 (R. pp. 36-38). This offer was accepted by the Government on the 28th day of December, 1940 (R. p. 38).

The Government assumed possession as it had a right to do under the contract and has remained in continuous possession ever since. But subsequently and on the 6th day of June, 1941, it repudiated its agreement and filed a condemnation proceeding against the petitioners in the United States District Court for the Eastern District of Missouri to acquire title to the land in that manner (R. pp. 2, 3). This proceeding was in the usual form and was brought pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C. A., Sec. 257), and the Act of Congress approved July 2, 1917 (50 U. S. C. A., Sec. 171), as amended, which authorized the acquisition by the Secretary of War of land suitable and necessary for military purposes (R. pp. 4-9). On the same day the condemnor filed a Declaration of Taking which recited, among other things (R. p. 10):

> "1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a), * * *."

Just compensation for the land taken was estimated therein to be $21,500.00 and that sum was deposited in the registry of the court (R. p. 14). Also on the same day an order was entered vesting the title to the land in question in the Government (R. pp. 15-17).

The landowners filed an answer asserting that the parties to the proceeding had entered into a contract prior to the filing of the suit and requesting the court to fix the award in the condemnation proceedings at the amount mentioned in the contract, to-wit, $70,000, with interest thereon at six per cent (6%) per annum from the date of the acceptance of the contract, to-wit, December 28, 1940 (R. pp. 17-26).

No proceedings were had in this cause to fix the value of the property taken until this Honorable Court, in the companion cases of **Muschany v. United States** and **Andrews v. United States**, 324 U. S. 49, 65 S. Ct. 442, decided that the so-called Options to Purchase Land were valid and, in effect, fixed the amount of the award in each condemnation proceeding at the amount agreed upon in the Option to Purchase Land applicable to each such proceeding. Thereafter, and on the 6th day of May, 1945, the Government filed a motion requesting the court to enter a judgment condemning the property and fixing the landowners' compensation at the sum of $70,000 and directing the condemnor to pay into the registry of the court the deficiency of $48,500, but without allowing the landowners any interest (R. pp. 27, 28). On the 2nd day of May, 1945, the petitioners filed an answer to the Government's motion requesting the court to enter a judgment condemning the land and fixing the compensation for the taking of the land at $70,000 but praying the court to also award the petitioners interest at the rate of six per cent (6%) per annum upon said $70,000 from the date of taking on or about December 28, 1940, to the making of the deposit ($21,500) at the time of the filing of the Declaration of Taking on June 6, 1941, and with interest at the same rate on the deficiency of $48,500 from June 6, 1941, until the payment of said deficiency (R. pp. 29, 30). On May 17, 1945, the Government paid into court the deficiency of $48,500 (R. p. 52).

Because of the large number of cases pending in the said United States District Court arising under the same circumstances and because of the widespread interest therein, all of the so-called Weldon Spring cases were submitted at the same time to a three-judge court consisting of the three United States District Judges sitting in the Eastern Judicial District of Missouri (R. pp. 32-46), but each Judge ruled individually on each of said cases pending before him.* Since all of these cases were submitted at the same time, no proof was required by the District Court from each individual landowner of the date of the taking of possession of his tract by the Government, the Court saying that if and when it is determined that the landowners are entitled to interest, they will be given an opportunity to make a showing in each case as to when the Government took possession (R. pp. 45, 46). On May 14, 1945, the District Court, in the proceeding to condemn the land of the petitioners, entered a judgment condemning the land and fixing the compensation at the sum mentioned in the contract, to-wit, $70,000, but denying the landowners any sum as interest (R. pp. 47-52). Subsequently, the petitioners took an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 1). On April 9, 1946, said United States District Court of Appeals filed its opinion and entered a judgment in said cause affirming the judgment of the District Court (R. pp. 79-86). On the same day memorandum opinions were filed by said United States Circuit Court of Appeals in appeals from companion cases entitled and designated United States of America, appellant, v. Edgar S. Albrecht et al., appellees, No. 13,223, Civil; United States of America, appellant, v. Q. W. S. S.

*Judge Moore and Judge Duncan ruled that the landowners were entitled to interest in the cases pending before them. Judge Moore's opinion on the subject is reported at 61 F. Supp. 199. Judge Duncan filed no opinion. Judge Hulen ruled that the landowners were not entitled to interest in an opinion reported at 60 F. Supp. 741. The instant case is one of several pending before Judge Hulen.

Realty & Investment Company, appellee, No. 13,226; United States of America, appellant, v. Edward J. Linnenbringer et al., appellees, No. 13,227, and United States of America, appellant, v. Dennis B. Pitman et al., appellees, No. 13,228. These last mentioned appeals were decided upon the basis of the court's opinion in this cause.

Thereafter, and on the 23rd day of April, 1946, and within the time allowed by the rules of the said United States Circuit Court of Appeals, the petitioners filed their Petition for Rehearing (R. pp. 88-89). This petition was on the 30th day of April, 1946, denied by the said United States Circuit Court of Appeals, on which day said judgment of the said United States Circuit Court of Appeals in this cause became final (R. p. 100).

The duly certified record, including all the proceedings in this cause in said District Court and in said United States Circuit Court of Appeals, is filed herewith under separate cover, together with the requisite number of printed copies thereof.

QUESTIONS PRESENTED.

The questions presented by this Petition for a Writ of Certiorari are:

1. Did the petitioners, as landowners, waive their right to interest from the date of taking to the date of payment by entering into the contract in question?

2. Were the petitioners, as landowners, denied their statutory rights by the failure to allow them interest from the date of taking to the date of payment of the award?

3. Were the petitioners, as landowners, denied just compensation guaranteed them by the Constitution of the United States by the failure to allow them such interest?

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

2. In holding that the landowners by their successful defense of the contract in the condemnation proceeding thereby changed the nature of the proceedings so as to preclude recovery of interest for the period between the taking of the property and payment.

3. In refusing to allow interest against the Government for delay.

4. In refusing to recognize that a statute existed which required the Government to pay the landowners interest.

5. In refusing to hold that the Government was estopped to deny the landowners' right to interest.

6. In refusing to accord the landowners "just compensation" as required by the Constitution of the United States.

7. In distinguishing the opinion of the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Court of Appeals erred in construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

The Court recognized the well established rule that "just compensation" guaranteed by the Fifth Amendment to the Constitution of the United States to a landowner whose property has been taken for public purposes, where the taking precedes the payment, includes interest as well as the fair market value of the property at the time of the taking.

> Shoshone Tribe of Indians v. United States, 299 U. S. 476, 57 S. Ct. 244;
> Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;
> United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281.

This rule has been adopted by Congress in the enactment of 40 U. S. C. A., Sec. 258a, under which the government proceeded in this case, which provides in part as follows:

> "Upon the filing (of) said Declaration of Taking and of the deposit in the Court, * * * said compensation shall be ascertained * * * and the said judgment shall include, as part of the just compensation awarded, interest at the rate of six per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the Court."

Interest is awarded to compensate the owner for loss of possession of his property or postponement of the en-

joyment of the money received for the taking of his property.

Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354.

The Court of Appeals also recognized the fact that in condemnation proceedings the Government and the landowner may by contract agree on the value of the land rather than to have the same fixed by a commissioners' award or a jury verdict. Such was decided by this Court in **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231. The Court of Appeals quite correctly said that in drawing such a contract the parties could provide that the amount agreed upon therein should constitute the fair market value of the land or could stipulate that the amount agreed upon should include not only the fair market value of the land at the time of taking but other items of damage as well, i. e., interest, when the taking occurs before the payment. But it is submitted that the Court of Appeals erred in construing the contract in question as evidencing the intent of the parties thereto that the $70,000 agreed upon should include all items of just compensation and not merely the agreed value of the land at the time of the taking.

Since by virtue of the Fifth Amendment to the Constitution of the United States and 40 U. S. C. A., Sec. 258a, a landowner whose property is taken before payment is made is entitled to interest as well as the fair market value of the property at the time of taking, it follows that the landowners in the instant case were entitled to such interest unless they waived their right to the same by entering into a contract. A reading of the contract reveals that no such waiver is contained therein. In fact, interest is not mentioned anywhere within its four corners (R. pp. 36-38). The $70,000 is referred to variously as "the gross

sales price" (R. p. 36), "the agreed purchase price" (R. p. 37) and "the agreed valuation" (R. p. 37). If anything, these terms are more closely related in meaning to the fair market value at the time of taking than they are to interest. Certainly that is so of the phrase "the agreed valuation". It should be noted that the contract expressly provided that if the title to the land was not approved by the Attorney General, the Government should acquire the land by condemnation proceedings and in such proceedings "a consent verdict fixing the award at the agreed valuation" should be entered (R. p. 37). If such had occurred and if the Government had delayed payment of the award, no one would deny the right of the landowners to interest for the delay in payment. This indicates that the amount agreed upon in the contract served the same purpose as an award, which is always the fair market value of the property at the time of the taking, and does not include interest for delay in payment of the award.

The Court of Appeals' conclusion that the amount fixed in the contract included interest as well as the fair market value at the time of the taking seems to be based in the main, if not entirely, upon the fact that by the contract the Government was granted the right of immediate possession as well as title to the land, and upon the construction by the Court of Appeals that the contract did not fix a time within which payment was required. From this the Court apparently believed that it was the right of the Government under the contract to acquire possession and retain it indefinitely without paying for the use of the property, which, incidentally, is almost what the Government did. No such construction of the contract is justified either in the letter or the spirit of the instrument. It is true that the contract did give the Government immediate possession, but by its very terms the Government could remain in possession only "* * * until such time as said land is

conveyed to the Government * * *, the title approved * * * and the agreed purchase price paid by the Government * * *" (R. p. 37). A subsequent provision in the contract required the Government to make payment as follows (R. p. 37):

> "Upon furnishing of final certificate of title * * * the agreed purchase price above mentioned will be paid by the Government to the undersigned."

From this it will be seen that although the Government obtained the right of immediate possession under the contract, it could only remain in possession until it paid the agreed purchase price and this it was required to do when a final certificate of title was furnished it by the landowners, and it could not remain in possession of the land indefinitely under the contract.

It is submitted that the proper construction to be laid upon the contract is that which the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190, gave to a similar contract. There condemnation proceedings were instituted by the United States of America against certain land which it desired to acquire for military purposes. After the petition had been filed the Government and the landowners entered into a stipulation agreeing that the court "* * * is hereby authorized and petitioned to enter without further notice a final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any declaration of taking which may hereafter be filed by the plaintiff, vesting the title to the above described property in the United States of America, and adjudging just compensation for the lands taken, to be in the sum of * * *." About seven months elapsed between the execution of this stipulation and the payment of the amount due thereunder. In holding that the landowners were entitled to interst in addition to the

amount agreed upon in the stipulation for the period of time between the signing of the same and the payment of the amount agreed upon, the court said (149 Fed. [2d], l. c. 193):

> "• • • when the parties reduced to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right.
>
> "• • • But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract." (Emphasis of the court.)

Since more than four years elapsed between the signing of the contract in the case at hand and the payment of the amount thereunder, it is interesting to observe that the Court of Appeals in **United States v. Baugh** found that a delay in payment of seven or eight months was an unreasonable period.

Many landowners who formerly lived within the area taken by the Government are adversely affected by the decision of the Court of Appeals, as their right to interest is based on identical facts and legal principles as are found in this proceeding. The determination of this case is a matter of great public interest.

II.

The Court of Appeals fell into error when it held that the landowners, by their successful defense of the validity of the purchase contract, changed the nature of the proceeding instituted by the Government. When the Government repudiated the contract, the landowners were ac-

corded the election of recognizing the breach and allowing the fair market value of the property to be fixed by a commissioners' award or by a jury verdict, or if they did not want to run the risk of such litigation of having the fair market value established at the amount agreed upon in the contract. The landowners elected to take the latter course. This illustrates that the contract in the case at hand, in fixing the fair market value of the property at $70,000, served the function of a commissioners' award or a jury verdict. Such was the interpretation placed by this Court upon a similar contract entered into between the Government and the landowners and which was also repudiated by the Government by the bringing of a condemnation proceeding. **Danforth v. United States,** 308 U. S. 271, 60 S. Ct. 231. There this Court said (308 U. S., l. c. 281):

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. * * * The effect of such an agreement is to fix the value of the easement when the authority of the court is invoked against a party to the agreement to acquire good title."

And in the companion case of **Muschany v. United States,** 324 U. S. 49, 65 S. Ct. 442, this Court, referring to a contract identical in form to the one in the case at hand, said (65 S. Ct., l. c. 445):

> "The option * * * provides for an agreed valuation at the option price in case of condemnation."

The fixing of the fair market value of the property by the contract instead of by a commissioners' award or a jury verdict did not in anywise change the nature of the condemnation proceeding brought by the Government. As was said in **United States v. Baugh,** supra (149 Fed. [2d], l. c. 192):

"The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Since the land in the case at hand was taken over four years before payment was made, if the landowners had elected to recognize the breach of the contract by the Government and had permitted commissioners or a jury to fix the fair market value of the property, beyond any question they would have been entitled to interest for the time during which payment was postponed in addition to the fair market value of the property. Having elected, however, to uphold the contract and to have the fair market value fixed in accordance with its terms, the only effect upon the proceeding is to eliminate the necessity of a commissioners' award or a jury verdict to fix the value of the property, and the landowners are entitled to interest for the postponed payment in the same manner in which they would have been entitled to interest had the value of the property been fixed by award or verdict. A reading of the entire record of the case shows that the action was instituted as a condemnation proceeding pursuant to the Federal Statutes in such cases made and provided, including the Declaration of Taking statute (40 U. S. C. A., Sec. 258a), which expressly requires the payment of interest for delayed payment. And the proceeding continued to its end in compliance with condemnation practice with the single exception of the agreement between the parties being substituted for the commissioners' award or jury verdict.

III.

The Court of Appeals erred in refusing to allow interest against the Government for delay. It is true that as a general rule interest will not be allowed against a sovereign in the absence of a statute or express contract imposing the same. **United States v. North Carolina,** 136 U. S. 211, 10 S. Ct. 920; **United States v. Rogers,** supra; **Seaboard Airline Ry. Co. v. United States,** supra. But it is equally well settled that because of the constitutional guaranty of "just compensation," this rule is not applied in condemnation cases where the property is taken before payment is made.

Seaboard Airline Ry. Co. v. United States, supra;
United States v. Sargent, 162 Fed. 81, 89 C. C. A. 81, dismissed 215 U. S. 618, 30 S. Ct. 410;
Van Wagoner, Highway Commissioner, v. Morrison, 279 Mich. 285, 271 N. W. 760;
State ex rel. Steubenville Ice Co. v. Merrell, Director of Highways, 127 Ohio St. 453, 189 N. E. 116.

In **Seaboard Airline Ry. Co. v. United States,** supra, this Court said:

> "The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

IV.

But even if the rule that interest is not allowed against a sovereign in the absence of an express contract or statute were applicable to the case at hand, such a statute

existed. See 40 U. S. C. A., Sec. 258a. In fact, the Government elected to proceed under the statute by filing a Declaration of Taking (R. pp. 10-14). The decision of the Court of Appeals clearly deprives the landowners of their statutory rights.

V.

The Court of Appeals erred in refusing to hold that the Government was estopped from denying the landowners' right to interest. Upon the institution of the condemnation proceeding by the Government, it filed a Declaration of Taking pursuant to the express terms of 40 U. S. C. A., Sec. 258a (R. pp. 10-14), and obtained valuable benefits from invoking that statute because an order and judgment was entered upon the Declaration of Taking upon the same day the condemnation proceeding was filed, investing the Government with immediate possession and title to the land in question (R. pp. 15-17). But this statute also expressly required the Government to pay interest to the landowners upon the difference between the amount paid into Court at the time of the filing of the Declaration of Taking and the amount finally awarded the landowners. It is fundamental that a party will not be permitted to enjoy the benefits of a transaction and repudiate the obligations arising therefrom, especially where the other party to the transaction has been placed at a disadvantage, as the landowners were in the case at hand by being deprived of the possession and title to their property. **Davis v. Wakelee**, 156 U. S. 680, 15 S. Ct. 555; **Officer v. J. L. Owens & Co.**, 252 Fed. 337; **Horne v. Beattie**, 167 La. 647, 120 So. 38; **Mauritz v. Schwind**, 101 S. W. (2d) 1085 (Tex. C. A.); **Southern Surety Co. v. Illinois Powder Mfg. Co.**, 31 S. W. (2d) 314 (Tex. C. A.), in which the Court held that where a party invokes a statute as the basis of his claim, he must take the statute as a whole.

A comparable situation has arisen occasionally in condemnation proceedings where a landowner accepts money awarded to him in condemnation proceedings and then undertakes to deny the validity of the proceedings. In such a case the Supreme Court of Missouri, in **Chicago Great Western Ry. Co. v. Kemper**, 256 Mo. 279, 166 S. W. 291, adopted the following language found in the case of **Holland v. Spell**, 144 Ind. 561, 42 N. E. l. c. 1015:

> "We can conceive no good reason why he should, in good conscience, be permitted to receive all the benefits of the proceeding, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits."

VI.

By refusing the landowners' interest the Court of Appeals denied them "just compensation" guaranteeed by the Fifth Amendment to the Constitution of the United States. This point has already been discussed heretofore. In so doing, the Court of Appeals refused to follow the latest decisions of this Honorable Court as to the meaning of "just compensation".

Shoshone Tribe of Indians v. United States, 299 U. S. 476, 57 S. Ct. 244;
Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;
United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281.

VII.

The Court of Appeals erred in distinguishing the decision of the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2) 190. Rather indecisively the Court of Appeals in the instant case said that the **Baugh** case was distinguishable because "* * * the contract there involved was interpreted by the Court as fixing only the

fair value of the land for the purpose of a condemnation then proceeding" (R. p. 86). It is true that the contract in the **Baugh** case was entered into after the condemnation proceeding was instituted, whereas in this case it was entered into before the proceedings were begun. But, of course, distinctions of no significance are to be given no weight. What difference did it make in the determination of the question of whether or not the landowners were entitled to interest, that the stipulation between the parties to the litigation was executed before or after the condemnation proceedings were begun? The question is to be determined by these factors and these alone: (1) was there a taking prior to payment, and (2) if so, did the contract of the parties waive the landowners' right to interest? Obviously, the time of the execution of the contract as related to the commencement of the proceedings is of no importance whatever in the determination of this question. A clear conflict exists between the opinion of the Eighth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in the **Baugh** case.

PRAYER.

Wherefore, your petitioners pray, for the reasons stated, that this petition for certiorari be granted.

Respectfully submitted,

WILLIAM L. IGOE,
RICHMOND C. COBURN,
Counsel for Petitioners.

APPENDIX.

Title 40, U. S. C. A., § 258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto:

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States,

and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

A. RAY OLIVER, Executor of the Estate of Lola Castlio Oliver, Deceased, A. RAY OLIVER and B. IRENE CASTLIO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 151.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

A. RAY OLIVER, Executor of the Estate of Lola Castlio Oliver, Deceased, A. RAY OLIVER and B. IRENE CASTLIO, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. 151.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONERS.

This case is here on writ of certiorari issued by this Court on the 14th day of October, 1946, directed to the United States Circuit Court of Appeals for the Eighth Circuit to review the opinion and judgment of said Court in the case of Lola Castlio Oliver and A. Ray Oliver, Her Husband, and Mrs. B. I. Castlio (Also Known as B. Irene Castlio), Appellants, v. United States of America, Appellee, No. 13,174, Civil, in said Court of Appeals. A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, Deceased, succeeded the said Lola Castlio Oliver, deceased, as a party to the said cause by an order entered by the said Circuit Court of Appeals on the 17th day of May, 1946 (R. p. 103).

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the above mentioned case, No. 13,174, appears in the printed transcript filed herein on pages 77 to 84, inclusive, and is now printed in 155 Fed. (2d) 73.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 [28 U. S. C. A., Sec. 347 (a)].

The judgment of which review is sought was entered by the Circuit Court of Appeals for the Eighth Circuit on April 9, 1946 (R. p. 85), but did not become final until April 30, 1946, when petitioners' (appellants') Petition for Rehearing was denied (R. p. 99).

An application to withhold a mandate of the said Court of Appeals for thirty days in order to permit petitioners to apply to this Court for writ of certiorari was sustained by the Court of Appeals by order entered on May 10, 1946 (R. p. 100).

A duly certified copy of the Record, including all of the proceedings in this cause in the District Court of the United States and in said Court of Appeals, was filed herein together with the requisite number of copies thereof in compliance with the rules of this Court.

The constitutional provision involved herein is Amendment V to the Constitution of the United States which provides in part "* * * nor shall private property be taken for public use, without just compensation."

The statutory provision involved is 40 U. S. C. A., Sec. 258a, c. 307, Sec. 1, 46 Stat. 1421.

STATEMENT.

The petitioners were the owners of certain land located in St. Charles County, Missouri. On the 24th day of December, 1940, they signed a written offer designated an "Option to Purchase Land" to sell this land to the United States of America for the sum of $70,000 (R. pp. 36-38). This offer was accepted by the Government on the 28th day of December, 1940 (R. p. 38).

The Government assumed possession as it had a right to do under the contract and has remained in continuous possession ever since. But subsequently and on the 6th day of June, 1941, it repudiated its agreement and filed a condemnation proceeding against the petitioners in the United States District Court for the Eastern District of Missouri to acquire title to the land in that manner (R. pp. 2, 3). This proceeding was in the usual form and was brought pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C. A., Sec. 257), and the Act of Congress approved July 2, 1917 (50 U. S. C. A., Sec. 171), as amended, which authorized the acquisition by the Secretary of War of land suitable and necessary for military purposes (R. pp. 4-9). On the same day the condemnor filed a Declaration of Taking which recited, among other things (R. p. 10):

> "1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a). * * *."

Just compensation for the land taken was estimated therein to be $21,500.00 and that sum was deposited in the registry of the court (R. p. 14). Also on the same day an order was entered vesting the title to the land in question in the Government (R. pp. 15-17).

The landowners filed an answer asserting that the parties to the proceeding had entered into a contract prior to the filing of the suit and requesting the court to fix the award in the condemnation proceedings at the amount mentioned in the contract, to-wit, $70,000, with interest thereon at six per cent (6%) per annum from the date of the acceptance of the contract, to-wit, December 28, 1940 (R. pp. 17-26).

No proceedings were had in this cause to fix the value of the property taken until this Honorable Court, in the companion cases of **Muschany v. United States** and **Andrews v. United States**, 324 U. S. 49, 65 S. Ct. 442, decided that the so-called Options to Purchase Land were valid, and, in effect, fixed the amount of the award in each condemnation proceeding at the amount agreed upon in the Option to Purchase Land applicable to each such proceeding. Thereafter, and on the 6th day of May, 1945, the Government filed a motion requesting the court to enter a judgment condemning the property and fixing the landowners' compensation at the sum of $70,000 and directing the condemnor to pay into the registry of the court the deficiency of $48,500, but without allowing the landowners any interest (R. pp. 27, 28). On the 2nd day of May, 1945, the petitioners filed an answer to the Government's motion requesting the court to enter a judgment condemning the land and fixing the compensation for the taking of the land at $70,000, but praying the court to also award the petitioners interest at the rate of six per cent (6%) per annum upon said $70,000 from the date of taking on or about December 28, 1940, to the making of the deposit ($21,500) at the time of the filing of the Declaration of Taking on June 6, 1941, and with interest at the same rate on the deficiency of $48,500 from June 6, 1941, until the payment of said deficiency (R. pp. 29, 30). On May 17, 1945, the Government paid into court the deficiency of $48,500 (R. p. 52).

Because of the large number of cases pending in the said United States District Court arising under the same circumstances and because of the widespread interest therein, all of the so-called Weldon Spring cases were submitted at the same time to a three-judge court consisting of the three United States District Judges sitting in the Eastern Judicial District of Missouri (R. pp. 31-46), but each Judge ruled individually on each of said cases pending before him.* Since all of these cases were submitted at the same time, no proof was required by the District Court from each individual landowner of the date of the taking of possession of his tract by the Government, the Court saying that if and when it is determined that the landowners are entitled to interest, they will be given an opportunity to make a showing in each case as to when the Government took possession (R. pp. 45, 46). On May 14, 1945, the District Court, in the proceeding to condemn the land of the petitioners, entered a judgment condemning the land and fixing the compensation at the sum mentioned in the contract, to-wit, $70,000, but denying the landowners any sum as interest (R. pp. 47-52). Subsequently, the petitioners took an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 1). On April 9, 1946, said United States Circuit Court of Appeals filed its opinion and entered a judgment in said cause affirming the judgment of the District Court (R. pp. 77-85). On the same day memorandum opinions were filed by said United States Circuit Court of Appeals in appeals from companion cases entitled and designated United States of America, appellant, v. Edgar S. Albrecht et al., appellees, No. 13,223, Civil; United States of America, appellant, v. Q. W. S. S. Realty & Investment Company, appellee, No.

*Judge Moore and Judge Duncan ruled that the landowners were entitled to interest in the cases pending before them. Judge Moore's opinion on the subject is reported at 61 F. Supp. 199. Judge Duncan's opinion is not reported. Judge Hulen ruled that the landowners were not entitled to interest in an opinion reported at 60 F. Supp. 741. The instant case is one of several pending before Judge Hulen.

13,226; United States of America, appellant, v. Edward J. Linnenbringer et al., appellees, No. 13,227, and United States of America, appellant. v. Dennis B. Pitman et al., appellees, No. 13,228, reported in 155 Fed. (2d) 77. These last mentioned appeals were decided upon the basis of the court's opinion in this cause. This court has granted certiorari in each of the last mentioned cases.

Thereafter, and on the 23rd day of April, 1946, and within the time allowed by the rules of the said United States Circuit Court of Appeals, the petitioners filed their Petition for Rehearing (R. pp. 87-99). This petition was on the 30th day of April, 1946, denied by the said United States Circuit Court of Appeals, on which day said judgment of the said United States Circuit Court of Appeals in this cause became final (R. p. 99).

The duly certified record, including all the proceedings in this cause in said District Court and in said United States Circuit Court of Appeals, have been filed herein, together with the requisite number of printed copies thereof.

QUESTIONS PRESENTED.

The questions presented are:

1. Did the petitioners, as landowners, waive their right to interest from the date of taking to the date of payment by entering into the contract in question?

2. Were the petitioners, as landowners, denied their statutory rights by the failure to allow them interest from the date of taking to the date of payment of the award?

3. Were the petitioners, as landowners, denied just compensation guaranteed them by the Constitution of the United States by the failure to allow them such interest?

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

2. In holding that the landowners by their successful defense of the contract in the condemnation proceeding thereby changed the nature of the proceedings so as to preclude recovery of interest for the period between the taking of the property and payment.

3. In refusing to allow interest against the Government for delay.

4. In refusing to recognize that a statute existed which required the Government to pay the landowners interest.

5. In refusing to hold that the Government was estopped to deny the landowners' right to interest.

6. In refusing to accord the landowners "just compensation" as required by the Constitution of the United States.

7. In distinguishing the opinion of the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190.

SUMMARY OF THE ARGUMENT.

I.

A landowner whose property has been taken in condemnation is guaranteed "just compensation" which includes not only the fair market value of the property at the time of the taking but additional compensation for loss of use of the land or postponment of the use of its money equivalent. Prior to the enactment of 40 U. S. C. A., Sec. 258a, the federal courts awarded the landowner interest at the local rate upon the value of the property from the date of taking to the date of payment. But now, under said statute, under which the Government proceeded in this case, interest is awarded at the rate of six per cent (6%) per annum upon the value of the property from the date of taking to the date of payment, except that no interest is allowed upon any sum paid into court pursuant to a declaration of taking.

Shoshone Tribe of Indians v. United States, 299 U. S. 476, 57 S. Ct. 244;

Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;

United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281;

Fifth Amendment to the Constitution of the United States;

Article 2, Sec. 21, of the Constitution of the State of Missouri (1875);

40 U. S. C. A., Sec. 258a, approved Feb. 26, 1931.

II.

Generally interest cannot be collected from a sovereign in the absence of a statute or a contract requiring such payment, but this rule has no application in condemnation cases where the property is taken before payment is made.

United States v. State of North Carolina, 136 U. S. 211, 10 S. Ct. 920;

Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;

United States v. Sargent, 162 Fed. 81, 89 C. C. A. 81;

Van Wagoner, Highway Commissioner, v. Morrison, 279 Mich. 285, 271 N. W. 760;

State ex rel. Steubenville Ice Co. v. Merrell, Director of Highways, 127 Ohio St. 453, 189 N. E. 116.

III.

The contract in the instant case served in lieu of a commissioners' award or a jury verdict fixing the value of the property at the time of taking.

Danforth v. United States, 308 U. S. 271, 60 S. Ct. 231;

Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442;

United States v. Baugh, 149 Fed. (2d) 190 (C. C. A. 5).

IV.

The landowners did not waive their right to interest guaranteed them under the Constitution and by statute in the contract in the instant case.

United States v. Baugh, 149 Fed. (2d) 190 (C. C. A. 5);

Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond, 262 U. S. 649, 43 S. Ct. 651.

V.

A condemnation statute under which proceedings are instituted will be construed strictly in favor of the landowner and the statute must be fully complied with.

City of Cincinnati v. Vester, 281 U. S. 439, 50 S. Ct. 360;

United States v. 2.4 Acres of Land in Lake County, 138 Fed. (2d) 295;

City of St. Louis v. Smith, 325 Mo. 471, 30 S. W. (2d) 729;
State ex rel. Siegel v. Grimm, 314 Mo. 242, 284 S. W. 490;
40 U. S. C. A., Sec. 258a.

VI.

The United States, having accepted the benefits of 40 U. S. C. A., Sec. 258a, by obtaining title pending the litigation is estopped from denying the obligation arising from that section to pay interest to the landowner.

Davis v. Wakelee, 156 U. S. 680, 15 S. Ct. 555;
Officer v. J. L. Owens Co., 252 Fed. 337;
Holland v. Spell, 144 Ind. 561, 42 N. E., l. c. 1015;
Horne v. Beattie, 167 La. 647, 120 So. 38;
Chicago Great Western Ry. Co. v. Kemper, 256 Mo. 279, 166 S. W. 291;
Mauritz v. Schwind, 101 S. W. (2d) 1085 (Tex. C. A.);
Southern Surety Co. v. Illinois Powder Mfg. Co., 31 S. W. (2d) 314 (Tex. C. A.);
40 U. S. C. A., Sec. 258a.

ARGUMENT.

I.

Where a Condemnor Takes Property Before Payment Therefor Is Made, the Landowner Will Be Allowed Interest or Its Equivalent Upon the Award From the Date of Taking to the Date of Payment as a Part of the "Just Compensation" to Which He Is Entitled.

A landowner whose property has been taken by a condemnor is guaranteed "just compensation" by the Fifth Amendment to the Constitution of the United States and by Article 2, Section 21 of the Constitution of the State of Missouri (1875). This is deemed to be the fair market value at the time of the taking. And where the condemnor has taken the property before compensation was paid, "just compensation" includes not only the fair market value of the property at the time of the taking, but an additional item that will compensate the landowner for the loss of the use of his land or the postponement of the use of the money due him. **Shoshone Tribe of Indians v. United States**, 299 U. S. 476, 57 S. Ct. 244; **Seaboard Airline Ry. Co. v. United States**, 261 U. S. 299, 43 S. Ct. 354; and **United States v. Rogers**, 255 U. S. 163, 41 S. Ct. 281.

A statement of the rule is found in **Seaboard Airline Ry. Co. v. United States**, at 261 U. S., l. c. 306, 43 S. Ct. 356, as follows:

> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.

> Interest at a proper rate is a good measure by which to ascertain the amount so to be added."

In **Shoshone Tribe of Indians v. United States**, Mr. Justice Cardozo, speaking for the court, said (299 U. S., l. c. 497, 57 S. Ct., l. c. 251):

> "Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages."

The practice grew up in federal condemnation cases, where the property was taken before compensation was paid, of compensating the owner for the loss of use of his property or of his money by awarding him interest at the local rate on the fair market value of the property from the date of taking to the date of payment of compensation. In **United States v. Rogers**, supra, the Supreme Court, in affirming an allowance of interest at the rates fixed by the statutes of New Mexico where the lands in question were located, said (255 U. S., l. c. 169, 41 S. Ct., l. c. 282):

> "The government urges that the Conformity Act of August 1, 1888, does not require the United States government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for, the justice and propriety of its adoption."

From these authorities it will be seen that where the property was taken before payment was made, the landowner was entitled to interest as a part of the "just compensation" guaranteed by the Constitution even though

the statute under which the proceedings were brought made no provision for the payment of interest or any substitute therefor. Such was the case in the authorities to which reference has just been made.

Ultimately, an Act was passed by Congress, 40 U. S. C. A., Sec. 258a, approved February 26, 1931, which provides in part as follows:

> "Upon the filing (of) said Declaration of Taking and of the deposit in the Court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said Declaration • • • said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 percentum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the Court."

It will be seen that the pre-existing common-law rule was incorporated into the Act, and the only effect of the legislation is to require the use of a uniform rate of interest in compensating a landowner for the loss of use of his property or its money equivalent. This statute was expressly employed in the instant case by the filing of the Declaration of Taking (R. p. 10).

II.

The Rule That Interest Cannot Be Collected From a Sovereign in the Absence of a Contract or Statute Authorizing It Is Not Applied in Proceedings Brought by the Sovereign to Condemn Property for Public Purposes.

It is well settled that generally interest cannot be collected from a sovereign in the absence of a statute or a

stipulation in the contract authorizing the same. **United States v. State of North Carolina**, 136 U. S. 211, 10 S. Ct. 920. But this rule is not applied in condemnation cases where the constitutional guarantees of "just compensation" afforded the landowner require the payment of interest, or its equivalent, even though no statute or contract authorizes the awarding of interest. **Seaboard Airline Ry. Co. v. United States**, 261 U. S. 299, 43 S. Ct. 354; **United States v. Sargent**, 162 Fed. 81, 89 C. C. A. 81; **Van Wagoner, Highway Commissioner, v. Morrison**, 279 Mich. 285, 271 N. W. 760; **State ex rel. Steubenville Ice Company v. Merrell, Director of Highways**, 127 Ohio St. 453, 189 N. E. 116.

In **Seaboard Airline Ry. Co. v. United States**, supra, a condemnation proceeding was brought under a statute which did not provide for an allowance of interest, the Court saying:

> "The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirements that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

III.

The Contract Served the Purpose of a Commissioners' Award or Jury Verdict in Condemnation Proceedings by Fixing the Value of the Property at the Time of the Taking.

The legal effect of the contract to purchase the land in question upon this condemnation suit brought by the Government after it had repudiated the contract is left in considerable doubt by the opinion of the Court of Ap-

peals. In its opinion the Court of Appeals seemed to proceed upon the premise that because this Court upheld the contract in Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442, the condemnation proceeding was thereby converted from a condemnation proceeding to a suit for specific performance of the contract. Of course such a premise is unjustified. This is in no sense a suit against the Government for the specific performance of a contract. The District Court would have had no jurisdiction of such a suit under 28 U. S. C. A., Sec. 41 (20), where the Tucker Act limits the jurisdiction of federal district courts in suits on contracts against the Government to controversies involving not more than $10,000. This is a condemnation suit in which the Government obtained title solely by virtue of its Declaration of Taking filed pursuant to 40 U. S. C. A., Sec. 258a. Having obtained title in condemnation only by virtue of that statute, the effect of the contract is to engraft upon the rights and duties of the parties under that statute the provisions of the contract only so far as the contract sets the fair value of the land. The contract, therefore, supplies the function of a commissioners' award or a jury verdict in the condemnation proceedings in fixing the value of the property at the time of the taking. Other than eliminating the necessity for this procedural step, the contract in no way changed the fundamental nature of this condemnation proceeding.

Much light is shed upon the legal effect that is to be given to such an agreement by the opinion of the Supreme Court in the case of **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231. There the Government and the landowners made a contract for the purchase by the Government of a flowage easement over the land for the sum of $31,681.98. The contract provided that friendly condemnation proceedings would be instituted by the Government. Thereafter the Government repudiated the contract

and brought condemnation proceedings under the Flood Control Act. The landowners asserted their contract in their answer, which was stricken by the trial court on motion. The commissioners awarded the landowners only $17,921.70. On appeal this Court said (308 U. S., l. c. 281):

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. * * * The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title."

The landowners were awarded the amount agreed upon in the contract. From the language just quoted it will be seen that the court held that the contract supplied the function of a commissioners' award or jury verdict in condemnation proceedings in fixing the value of the property at the time of the taking.

The Government pursued precisely the same course in the present case that it did in the **Danforth** case. The parties fixed a price on the property by their agreement in advance of the litigation. It is true that in the contract in the instant case it was not agreed that condemnation proceedings would certainly be instituted, but only on condition that the Attorney General refused to approve the title. But this difference is of no consequence because in both the **Danforth** case and the instant case the condemnation proceedings were instituted after the Government had repudiated the contract and were not brought pursuant to the contract. If the same effect is to be given to the contract in this case as was given to the contract in the **Danforth** case, it must be considered "an agreement * * * to fixe the value" of the land in question in lieu of a commissioners' award or a jury verdict. Upon the authority of the **Danforth** case, when the Government at-

tempted to repudiate its contract by bringing this condemnation proceeding, the parties' obvious intention to fix the value of the land by the contract should, as a matter of law, be given effect under existing circumstances by substituting the contract price for the award or verdict.

In the companion case of **Muschany v. United States**, 324 U. S. 49, 65 S. Ct. 442 this Court, referring to a contract identical in form to the one in the case at hand, said (65 S. Ct., l. c. 445):

> "The option * * * provides for an agreed valuation at the option price in case of condemnation."

The fixing of the fair market value of the property by the contract instead of by a commissioners' award or a jury verdict did not in anywise change the nature of the condemnation proceeding brought by the Government. As was said in **United States v. Baugh** (149 Fed. [2], l. c. 192):

> "The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Since the land in the case at hand was taken over four years before payment was made, if the landowners had elected to recognize the breach of the contract by the Government and had permitted commissioners or a jury to fix the fair market value of the property, beyond any question they would have been entitled to interest for the time during which payment was postponed in addition to the fair market value of the property. Having elected, however, to uphold the contract and to have the fair market value fixed in accordance with its terms, the only effect upon the proceeding is to eliminate the neces-

sity of a commissioners' award or a jury verdict to fix the value of the property, and the landowners are entitled to interest for the postponed payment in the same manner in which they would have been entitled to interest had the value of the property been fixed by award or verdict. A reading of the entire record of the case shows that the action was instituted as a condemnation proceeding pursuant to the Federal Statutes in such cases made and provided, including the Declaration of Taking statute (40 U. S. C. A., Sec. 258a), which expressly requires the payment of interest for delayed payment. And the proceeding continued to its end in compliance with condemnation practice with the single exception of the agreement between the parties being substituted for the commissioners' award or jury verdict.

The landowners, by their successful defense of the validity of the purchase contract in **Muschany v. United States**, supra, did not change the nature of these condemnation proceedings instituted by the Government. This is still a condemnation proceeding in which the Government obtained title by virtue of these proceedings and the only effect of the contract as held by this Court in **Muschany v. United States** is to eliminate the necessity for one of the procedural steps in the condemnation proceeding.

IV.

The Landowners Did Not Waive Their Right to Interest Guaranteed Them Under the Constitution and by Statute in the Contract in the Instant Case.

Under the foregoing principles at the time the Government filed this condemnation proceeding and acquired title to the property by virtue of its Declaration of Taking, the landowners were entitled under the Constitution and 40 U. S. C. A., Sec. 258a, to "just compensation", which included the fair market value of the property at

the time of the taking and interest at six per cent (6%) upon the value of the property from the date of taking to the date of payment. This right to "just compensation" including interest is still existent unless the landowners waived their right to interest in the contract.

Without making a detailed analysis here of the provisions of the contract, it may be said categorically that there is nothing therein which either expressly or impliedly waives the landowners' right to interest. The subject of interest is not mentioned at all. It may be implied, however, as a matter of law that the parties intended that interest should be paid in the event of involuntary condemnation because it was the settled law of the land under the Constitution and by statute that interest must be paid as compensation for loss of use of the land. The law subsisting at the time and place of making a contract is a part thereof, as though expressly referred to or incorporated therein. **Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond,** 262 U. S. 649, 43 S. Ct. 651. Thus, though the parties did not expressly cover the question of interest in the contract because the landowners did not anticipate the bringing of this condemnation proceeding constituting repudiation of the contract, in the absence of an express provision as to interest it may be taken as a matter of law that the parties intended that in the event the Government repudiated the contract and condemned the land interest should be paid. Of course, what the parties to the contract did intend to do was to fix the value of the property in question at the amount agreed upon, and the question here is whether such a contract constitutes a waiver of a constitutional and statutory right.

The Court of Appeals in its opinion held in construing the contract that it was the intent of the parties thereto that the $70,000 agreed upon should include all items of "just compensation" and not merely the agreed value of

the land at the time of the taking. Such a construction of the contract is premised upon the theory that the landowners in the contract waived their constitutional and statutory right to interest. A reading of the contract reveals that no such waiver is contained therein. In fact, interest is not mentioned anywhere within its four corners (R. pp. 36-38). The $70,000 is referred to variously as "the gross sales price" (R. p. 36), "the agreed purchase price" (R. p. 37) and "the agreed valuation" (R. p. 37). If anything, these terms are more closely related in meaning to the fair market value at the time of taking than they are to interest. Certainly that is so of the phrase "the agreed valuation." It should be noted that the contract expressly provided that if the title to the land was not approved by the Attorney General, the Government should acquire the land by condemnation proceedings and in such proceedings "a consent verdict fixing the award at the agreed valuation" should be entered (R. p. 37). If such had occurred and if the Government had delayed payment of the award, no one would deny the right of the landowners to interest for the delay in payment. This indicates that the amount agreed upon in the contract served the same purpose as an award, which is always the fair market value of the property at the time of the taking, and does not include interest for delay in payment of the award.

The Court of Appeals' conclusion that the amount fixed in the contract included interest as well as the fair market value at the time of the taking seems to be based in the main, if not entirely, upon the fact that by the contract the Government was granted the right of immediate possession as well as title to the land, and upon the construction by the Court of Appeals that the contract did not fix a time within which payment was required. From this the Court apparently believed that it was the right of the

Government under the contract to acquire possession and retain it indefinitely without paying for the use of the property, which, incidentally, is almost what the Government did. No such construction of the contract is justified either in the letter or the spirit of the instrument. It is true that the contract did give the Government immediate possession, but by its very terms the Government could remain in possession only "* * * until such time as said land is conveyed to the Government * * *, the title approved * * * and the agreed purchase price paid by the Government * * *" (R. p. 37). A subsequent provision in the contract required the Government to make payment as follows (R. p. 37):

> "Upon furnishing of final certificate of title * * * the agreed purchase price above mentioned will be paid by the Government to the undersigned."

From this it will be seen that although the Government obtained the right of immediate possession under the contract, it could only remain in possession until it paid the agreed purchase price and this it was required to do when a final certificate of title was furnished it by the landowners, and it could not remain in possession of the land indefinitely under the contract.

It is submitted that the proper construction to be laid upon the contract is that which the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190, gave to a similar contract. There condemnation proceedings were instituted by the United States of America against certain land which it desired to acquire for military purposes. After the petition had been filed the Government and the landowners entered into a stipulation agreeing that the court "* * * is hereby authorized and petitioned to enter without further notice a final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any declaration of taking

which may hereafter be filed by the plaintiff, vesting the title to the above described property in the United States of America, and adjudging just compensation for the lands taken, to be in the sum of * * *." About seven months elapsed between the execution of this stipulation and the payment of the amount due thereunder. In holding that the landowners were entitled to interest in addition to the amount agreed upon in the stipulation for the period of time between the signing of the same and the payment of the amount agreed upon, the court said (149 Fed. [2d], l. c. 193):

> "* * * when the parties reduce to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right.
>
> "* * * But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract." (Emphasis of the court.)

Since more than four years elapsed between the signing of the contract in the case at hand and the payment of the amount thereunder, it is interesting to observe that the Court of Appeals in **United States v. Baugh** found that a delay in payment of seven or eight months was an unreasonable period.

Any fair construction of the contract will reach the conclusion that the parties intended only to fix the value of the land. The legal effect of such an agreement in the event of repudiation and condemnation, as is pointed out in III supra, is that the contract serves in lieu of commissioners' award or a jury verdict fixing the value of the

property at the time of taking. In no way can it be said that the landowners, by agreeing upon the valuation of the land in a sales contract, thereby intended to waive their constitutional and statutory rights to interests in condemnation. If the solution to the problem is to be found in the opinions of this Court set out in I, II and III, supra, then the conclusion is forced that a reading of the contract in this case shows no evidence that the landowners intended to waive their right to interest guaranteed them in the event of condemnation by constitutional and statutory principles entirely independent of the contract.

In its brief in opposition to the Petition for Certiorari, the Government took the position that the landowners were not entitled to "just compensation" because the landowners insisted upon the contract as setting the market value of the land at the time of taking. This argument means that anyone who contracts to sell property to the Government ipso facto loses the constitutional and statutory guarantees he otherwise would have in the event of repudiation of the contract by the Government and subsequent condemnation. The argument is not based on the doctrine of intent or waiver but instead upon the flat premise that one who contracts with the Government thereby places himself beyond the pale of the protection of the Constitution and statutes in the event the Government thereafter decides to repudiate the contract and acquire the property by condemnation. This argument obviously goes much further even than the opinion of the Court of Appeals. The argument also means that this Court was wrong in **Muschany v. United States**, supra, and in **Danforth v. United States**, supra, in holding that the effect of such a contract is only to fix the value of the property at the time of taking in the event of condemnation. Under the holding of this Court in the two cases

last mentioned, the landowners, by signing the Government's contract, did not thereby deprive themselves of their constitutional and statutory rights, and the only way they could so deprive themselves would be to expressly waive those rights. It is submitted that such a waiver is not present in this contract.

V.

A Condemnation Statute Under Which Proceedings Are Instituted Will Be Construed Strictly in Favor of the Landowner and the Statute Must Be Fully Complied With.

There is a general principle governing the conduct of condemnation suits which is squarely applicable. It is well settled by numerous authorities that because the right of the condemnor to take a person's property without his consent is sharply at variance with the property rights of the owner, a condemnation statute under which proceedings are brought will be strictly construed in favor of the landowner and the statute must be fully complied with as a condition to the exercise of this unusual and arbitrary power on the part of the condemnor. **City of Cincinnati v. Vester**, 281 U. S. 439, 50 S. Ct. 360; **U. S. v. 2.4 Acres of Land in Lake County**, 138 Fed. (2d) 295; **City of St. Louis v. Smith**, 325 Mo. 471, 30 S. W. (2d) 729, and **State ex rel. Siegel v. Grimm**, 314 Mo. 242, 284 S. W. 490.

In the case at hand, although the condemnor expressly invoked 40 U. S. C. A., Sec. 258a, in its Declaration of Taking filed in this case (R. pp. 10-14) for the purpose of acquiring title to the land at once, the Government refuses to comply with the express requirements of the statute with reference to the payment of interest. This constitutes a failure to comply with the condemnation statute under which the proceedings were conducted in direct violation

of the rule that such statutes must be strictly complied with, especially where a violation would be in derogation of the rights of the landowner.

VI.

By Taking Title to the Property Under 40 U. S. C. A., Sec. 258a, the Government Is Estopped to Deny Its Obligation to Pay Interest as Required by the Statute.

40 U. S. C. A., Sec. 258a, confers valuable benefits upon the United States Government in a condemnation suit, chief of which is the opportunity to obtain title to the land at once pending the litigation. On the other hand, the statute imposes the obligation to pay interest upon the value of the property where the property is taken before payment is made. The Government availed itself of the special privileges of the statute by filing a Declaration of Taking, and obtaining title to the lands in question at once. It is fundamental that a party will not be permitted to enjoy the benefits of a transaction and repudiate the obligations arising therefrom, especially where the other party to the transaction has been placed at a disadvantage, as the landowners were in the case at hand by being deprived of the title to their property. **Davis v. Wakelee**, 156 U. S. 680, 15 S. Ct. 555; **Officer v. J. L. Owens Co.**, 252 Fed. 337.

In **Chicago Great Western Ry. Co. v. Kemper**, 256 Mo. 279, 166 S. W. 291, the court adopted the following language found in the case of **Holland v. Spell**, 144 Ind. 561, 42 N. E., l. c. 1015:

> "That he may estop himself, by the receipt of the money awarded in condemnation proceedings, to deny the validity of the proceedings, was held in a full and satisfactory opinion and citation of authority in Test v. Larsh, supra. **We can conceive no good reason why he should, in good conscience, be permitted to receive**

> **all the benefits of the proceedings, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits."** (Emphasis ours.)

In **Horne v. Beattie**, 167 La. 647, 120 So. 38, l. c. 39, the court said that "a person cannot accept the benefits of an act and repudiate its obligations."

In **Mauritz v. Schwind**, 101 S. W. (2d) 1085, l. c. 1092 (Tex. C. A.), the court said:

> "A person will not be permitted to accept the beneficial part of a transaction and repudiate the disadvantageous part."

In **Southern Surety Co. v. Illinois Powder Mfg. Co.**, 31 S. W. (2d) 314 (Tex. C. A.), the court held that where a party invokes a statute as the basis of his claim, he must take the statute as a whole.

On the basis of these authorities the Government, having enjoyed the benefits of the Declaration of Taking filed pursuant to 40 U. S. C. A., Sec. 258a, should be estopped from denying the obligations arising from the statute.

The Government has suggested in its brief in opposition to the Petition for Certiorari that the statute is not applicable because the full condemnation procedure was not followed. The force of this argument is not clear. The Government holds title to the land formerly owned by these landowners solely by virtue of this condemnation proceeding and the Declaration of Taking filed by the Government under this statute. The fact that this Court has held in **Muschany v. United States**, supra, that the contract makes unnecessary some of the procedure in condemnation because the parties, by the contract, fixed the value of the land does not change the fundamental fact that the Government obtained title by virtue of this statute, and, therefore, is now estopped from denying its obligations under the statute.

CONCLUSION.

It is respectfully urged that the judgment and record of the Court of Appeals of the Eighth Circuit in this case be quashed by this Court and that this Court determine that the landowners in the instant case are entitled to interest at the rate of six per cent (6%) per annum on $70,000 from the date of the taking of their property to the date of the initial payment of $21,500 (June 6, 1941), and interest at the same rate on the deficiency of $48,500 from June 6, 1941, to the date of the payment into Court of said deficiency. (May 17, 1945), and that the cause should be reversed and remanded to the trial court for a hearing to fix the date of taking and to compute the interest in this manner.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX.

Title 40, U. S. C. A., § 258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto:

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right

to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.

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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. [redacted] 155

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF BY THE PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Q. W. S. S. Realty and Investment Company, a corporation, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on the 9th day of April, 1946 in the case lately pending in said Circuit Court of Appeals, entitled United States of America, Appellant, versus Q. W. S. S. Realty and Investment Company, a corporation, Appellee, bearing number 13226 of the causes on the docket of said Circuit Court of Appeals,

reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of this petitioner and against said respondent, which said judgment of the said Circuit Court of Appeals became final on the 30th day of April, 1946 by the overruling by that Court of petitioners' petition for rehearing of said cause.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals in the above mentioned case (R. 295-296) recites that said cause is ruled by the opinion of said Court entered the same day in the case of Lola Castle Oliver and A. Ray Oliver, her husband, and [illegible] Candio, Appellants, vs. United States of America, Appellee, bearing Circuit Court of Appeals number 13174 (R. 297-303), a case arising out of the same land acquisition project involved in this case and involving identical questions of law. It is therefore not only the opinion in the case at bar but the opinion in the aforesaid Oliver case, which set forth the principles upon which this case was decided by the Circuit Court of Appeals, that petitioners here seek to have reviewed. Neither the Circuit Court of Appeals' opinion in this case No. 13226 nor in the aforesaid Oliver case, No. 13174, has yet been reported but the opinion in this case may be found beginning on page 295 of the transcript of the printed record filed herewith and the opinion in the aforesaid Oliver case appears in said transcript of the record beginning on page 296 thereof.

SUMMARY STATEMENT.

This suit is a condemnation suit against this petitioner and its tract of land known as tract No. 174 and alleged to contain 356.51 acres of land in St. Charles County, Missouri, for the acquisition of fee simple title to said land

by the United States for use by the War Department as a site for a T.N.T. manufacturing plant (R. 63-74). The petition was filed April 9, 1941 (R. 63). The petition alleged that the action was brought pursuant to the order of the Secretary of War under authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C., Sec. 257, as amended) and pursuant to the authority of the Act approved July 2, 1917, Title 50, U. S. C., Sec. 171, as amended, and of certain appropriating acts.

The aforesaid Act of August 1, 1888 (25 Stat. 375; 45 U. S. C., Sec. 257) was amended by the Act of Feb. 26, 1931 (46 Stat. 1421) commonly known as the Declaration of Taking Act. The petition in its prayer prays for an order under this last mentioned act "decreeing to the plaintiff the right to take immediate possession of said lands * * *" (R. 73). The aforesaid Declaration of Taking Act (46 Stat. 1421), Title 40 U. S. C., Sec. 258 (a), specifically provides for the payment of interest on delayed payments in condemnation cases.

A Declaration of Taking as to this land and other land had been filed by the United States on April 7, 1941 in case No. 770 in the District Court (R. 74). This Declaration of Taking also alleged that the land was to be taken under authority of the said Act of Feb. 26, 1931 [46 Stat. 1421, 40 U. S. C., Sec. 258 (a)] known as the Declaration of Taking Act (R. 74).

An order and judgment on said Declaration of Taking was entered by the District Court on April 9, 1941 (R. 79-83).

On April 7, 1941, the date of the filing of the aforesaid Declaration of Taking, the estimated compensation for the land involved in this case in the amount of $15,280.00 was deposited in the Registry of the Court (R. 78).

On April 9, 1941, the District Court ordered said sum of $15,280.00, the estimated compensation, transferred from case No. 770 to this case which bore District Court No. 800 (R. 84).

To this condemnation petition filed as aforesaid in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri this petitioner, being defendant in the said District Court, filed an answer on May 19, 1941 (R. 84-95), in which it alleged that it had entered into a contract in the form of an option granted to the United States to purchase the land involved for $52,000.00, which option was executed by it on Nov. 25, 1940, and accepted by the United States on Nov. 30, 1940. The petitioner, then defendant, set forth said option contract in full in said answer (R. 85-93) and alleged in substance that it had performed its obligations under said contract and that the United States had been granted possession of the land thereunder and had accepted same but had not paid the agreed consideration (R. 93 and 94) and prayed for a dismissal of the condemnation suit and for the setting aside of the order and judgment of taking (R. 95).

However, on April 2, 1945, this petitioner, then defendant in the District Court, by leave of court filed its amended answer in said District Court consenting to the condemnation proceeding and praying in substance that plaintiff's prayer for the fixing of the award for the value of the land in accordance with the report of three disinterested commissioners to be appointed by the Court be denied and that the award be fixed at $52,000.00, the agreed valuation of the land set forth in the contract, plus interest on the whole sum of $52,000.00 at the rate of 6% per annum from Nov. 30, 1940, the date of the surrender of possession, to April 9, 1941, the date of the payment of the estimated compensation into the Registry of the Court, plus interest on the difference between such estimated compensation and the $52,000.00 agreed valuation at 6% per annum from the date of the deposit of the estimated compensation to the date of the deposit of the additional amount in the Court Registry.

This option was given by this petitioner on Nov. 25, 1940, for a consideration of One Dollar ($1.00) and the landowner thereby agreed for that $1.00 consideration, if the option should be accepted by the United States within thirty days, to sell the land described therein to the United States for $52,000.00 (R. 85) and for the same $1.00 consideration this option granted to the United States the right of immediate occupancy and use of the land for any purpose whatsoever from and after acceptance of the option by the Government until such time as the land should be conveyed to the Government and the purchase price paid (R. 92).

Meanwhile, two other cases involving other lands in the same area and involving similar contracts were tried by the District Court. In both of these cases the defendants in their respective answers had prayed for the fixing of the award for the taking of the land at the agreed valuation in the contract and the defendant in one of the cases had prayed for the allowance of interest in the pleading upon which the case went to trial. In both cases the plaintiff had contended that the alleged contract was invalid.

Pending the final outcome of these two cases the United States had taken no further action in the case at bar or any of the numerous condemnation cases arising out of the Weldon Spring ordnance project.

The District Court, after trial of the two above mentioned cases, entered a decree in each of them holding the contract valid and fixing the award for the taking of the land at the agreed valuation set forth in the option contract and **allowing interest on the whole amount of the award from the date of the taking of possession to the date of payment of the estimated compensation into court and on the difference between the estimated compensation and the amount awarded from the date of the deposit of the estimated compensation to the date of payment of the amount of said difference.**

The plaintiff then had appealed to the United States Circuit Court of Appeals but had **utterly failed in its brief in that court to specify any error in the allowance of interest** but had directed its whole attack against the alleged invalidity of the contract. The Circuit Court of Appeals, in a joint opinion entitled United States v. Muschaney et al., and United States v. Andrews et al., 139 Fed. (2d) 661, had reversed the District Court in each case and had held that the respective contracts were invalid; whereupon the appellees in each case had applied for and been granted writs of certiorari by this Court and later this Court had in a joint opinion, being Muschaney v. United States and Andrews v. United States, 324 U. S. 49, reversed the Circuit Court of Appeals, holding the contracts valid and holding that the award for the value of the land should be fixed at the agreed valuation in the contract and had remanded the cases to the District Court with directions for further proceedings in accordance with the opinion of this Court. **Since the Government had failed in its appeal to present the interest question either to the Circuit Court of Appeals or to this Court,** both the Circuit Court of Appeals and this Court had naturally been silent on the subject of interest in their respective opinions.

Thereafter the United States, recognizing the validity of the option contract in view of the opinion of this Court in the Andrews and Muschaney cases, filed a motion for judgment in each similar condemnation case, including the case at bar, in which motion it cited the opinion of this Court in the Andrews and Muschaney cases above mentioned and prayed for judgment for plaintiff in condemnation and for the defendant for the contract valuation **without interest.** A motion of this character was filed in the case at bar on March 20, 1945 (R. 95).

On April 3, 1945, this petitioner, then defendant, filed a counter-motion for judgment for the plaintiff in condem-

nation and for the defendant for the contract valuation of $52,000.00 plus interest on said sum at the rate of 6% per annum on said amount from November 30, 1940, the date upon which it surrendered possession of the land, to April 9, 1941, the date upon which the estimated compensation was paid into court plus interest at said rate on the difference between said sum of Fifty-two Thousand Dollars ($52,000.00) and the amount of the estimated compensation paid into Court on April 9, 1941, for a period of time extending from said deposit date of April 9, 1941, to the date upon which said difference should be deposited in the Registry of the Court (R. 100-101), which said last mentioned date later turned out to be May 17, 1945 (R. 101-102).

This case, along with numerous other cases involving the same question, was heard on April 4, 1945. Each of the three District Judges, namely, Judge Moore, Judge Hulen and Judge Duncan, had some of these cases set for the last mentioned date, and in view of the similarity of the cases all three Judges sat together and heard the cases, but each Judge decided his own cases independently of the other two Judges.

The result was that Judges Moore and Duncan each reached a decision that the defendants **were entitled to interest on the difference between the amount of the estimated compensation and the amount of the final award based upon the agreed valuation in the contract for the period extending from the date of the deposit of the estimated compensation to the date upon which the said difference should be deposited, but that the defendants were not entitled to interest on the whole award from the date of the surrender of possession to the date of the deposit of the estimated compensation.** Judge Hulen decided in his cases that **no interest whatever should be awarded.** The case at bar happened to be one of the cases decided by Judge Duncan (R. 103-104). A decree in accordance with the above mentioned decision of Judge Duncan was entered

on November 26, 1945. This petitioner did not appeal from the disallowance of interest on the whole amount from the date of surrender of possession to the date of the deposit of the estimated compensation, but the United States did appeal to the Circuit Court of Appeals from the allowance of interest to the extent that it was allowed (R. 55). Said appeal was consolidated with three similar appeals and a joint record in all four appeals was compiled and printed (R. 287-288). Ten copies of this printed record are filed in this Court for use in connection with this petition and the other three petitions to which said joint record pertains. The four appeals were argued together before the Circuit Court of Appeals.

Meanwhile, an appeal of Lola Castlio Oliver and A. Ray Oliver, her husband, and Mrs. B. I. Castlio from the decision of Judge Hulen disallowing all interest in a similar case had been filed, perfected and submitted.

Thereafter, on April 9, 1946, the Circuit Court of Appeals rendered its decision and filed its opinion in said Oliver case, being case No. 13174 on the docket of the Circuit Court of Appeals of the Eighth Circuit, affirming the opinion of Judge Hulen which had disallowed interest (R. 296-303) and on the same day said Court entered a joint opinion reversing the District Court in this case and the other three cases with which it was jointly submitted and referring to the reasons given for not allowing interest embodied in the opinion in the Oliver case (R. 295-296).

At this point we call attention to the fact that the contract involved in this case, which was identical with the contract involved in all of the other cases, provided for the purchase and sale of the land by the parties thereto but provided for condemnation in the event it was deemed necessary for the purpose of clearing the title, and provided that in the event of such condemnation the award

should be fixed by a consent verdict at the **agreed valuation in the option** and that upon the filing of the petition a deposit of the **agreed amount** should be made with the Clerk of the Court (R. 92 and 93).

We also call attention to the fact that the Government went into possession **under the contract** and subsequently repudiated the contract and sought to acquire the land independently of the contract as shown by the opinion of the Circuit Court of Appeals at one point where it mentions the United States **as having repudiated its purchase contract** (R. 301) and at another point in its opinion where it mentions the fact that the United States did not proceed with condemnation proceedings **as contemplated by the purchase contract** but under the mistaken belief that the contract was void (R. 302).

This petitioner's petition for rehearing which had been filed in due time pursuant to the rules of the Circuit Court of Appeals (R. 323) was overruled by said Court on the 30th day of April, 1946 (R. 329).

A timely petition to stay the mandate of the Court for thirty days in order to permit this petitioner to apply to this Court for a writ of certiorari was sustained by the Circuit Court of Appeals by order entered on May 10, 1946 (R. 352).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Circuit Court of Appeals, is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides, in effect, that in

any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was originally entered on April 9, 1946 (R. 304-305). A petition for a rehearing was duly filed by petitioner, who was appellee in said Court, on April 24, 1946, within the time provided by the rules of said Court (R. 323), and said petition for a rehearing was denied by said Circuit Court of Appeals on the 30th day of April, 1946 (R. 329), which is the date on which the judgment of said Circuit Court of Appeals became final.

In said cause said petitioner specifically set up and claimed a right under the Constitution of the United States, being the just compensation provision of the Fifth Amendment thereto, and under the Statutes of the United States and particularly United States Code annotated, Title 40, Sec. 258(a), 258(e), which rights were denied by the decision and judgment of said Circuit Court of Appeals.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition for a writ of certiorari are:

1. Whether, as indicated by the opinion of the Circuit Court of Appeals (R. 301), in view of the fact that the agency of the Government acquiring the land for the United States was authorized to acquire it by purchase and that under such authority it entered into the contract involved in this proceeding (R. 85) and that that

contract provided for a purchase price of the land in the amount of $52,000.00 and also for the immediate possession of the land by the United States pending the accomplishment of the work of conveyancing and also, in the event of condemnation, for the immediate payment of the agreed valuation into the Registry of the Court upon filing the condemnation proceedings, the effect of such contract under all of these circumstances was to fix the total amount of all compensation to be received for the land at $52,000.00 with no interest for delayed payment regardless of the fact that the contract was violated and repudiated by the institution of a condemnation proceeding not in accordance with its terms and in defiance of its provisions for payment of the agreed valuation into the Court Registry at the time of the filing of the condemnation suit.

2. Whether the United States, by illegally repudiating the contract, forfeited its contract right to possession while remaining liable for the contract price and reacquired the right to possession and acquired the ownership of the property by virtue of a condemnation process under the Act of Feb. 26, 1931 [46 Stat. 1421, Title 40, U. S. C. 258 (a)] known as the Declaration of Taking Act, thereby rendering the provision of said Act for the payment of interest applicable.

3. Whether, even though the United States first acquired possession and the lawful right thereto under the option contract before it had repudiated same and continued to hold possession after it had by its Act in repudiating the contract forfeited the right thereto and until the entry of the order pursuant to the Declaration of Taking in the condemnation suit, it can now be heard to say that it did not acquire the land and the right to possession in an adversary condemnation proceeding.

4. Whether the United States, after bringing a condemnation suit in defiance of the terms of the contract and

after praying in its petition for the fixing of the award by commissioners rather than in accordance with the contract valuation and after paying into Court a different and less sum than the agreed valuation in the contract as estimated compensation, and after failing as provided by the contract in the event of condemnation to pay the agreed valuation into Court at the time of the institution of the proceeding, can at a later date convert the proceeding into a proceeding in conformity with the contract and thereby restore itself to all of the rights which it originally had under the contract, including the right to possession under the contract, by merely filing a motion to fix the award at the contract price and paying the contract price into court years after it should have been paid under the provisions of the contract.

5. Whether, as contended by the Circuit Court of Appeals (R. 301-302), the landowner, by insisting upon the validity of the purchase contract and upon its controlling effect upon the question of the compensation for the taking of the land as of the date of the taking, waived the right to interest set forth in the Declaration of Taking Act and the Fifth Amendment to the Constitution and thereby rendered the question of the allowance of interest in this proceeding determinable only by reference to the provisions of the contract itself.

6. Whether the mere fact that the award for the taking of the land in this proceeding was fixed in accordance with the agreed valuation in the contract instead of being fixed in accordance with a report of commissioners or a verdict of a jury prevents it from being true that just compensation for the land as of the date of the taking was "ascertained and awarded in said proceeding and established by judgment therein" within the meaning of the Declaration of Taking Act, being the Act of Feb. 26, 1931, Title 40 U. S. C., Sec. 258 (a), and therefore prevents the following provision of said Act:

"And the said judgment shall include, as part of the just compensation awarded, interest at the rate of six percentum per annum on the amount finally awarded as the value of the property as of the date of the taking, from said date to the date of payment"

from being applicable in this proceeding.

7. Whether the grant in the option of immediate possession of the land by the landowner to the Government upon the acceptance of the option was for the option consideration of One Dollar ($1.00) or was for the Fifty-two Thousand Dollar ($52,000.00) purchase price.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, by deciding in this case which is a condemnation case under the Declaration of Taking Act, being the Act of Feb. 26, 1931 (46 Stat. 1421), Title 40 U. S. C., Sec. 258a, among other Acts, that the landowner is not entitled to interest on that portion of the award not paid into Court at the time of the filing of the Declaration of Taking has rendered a decision in conflict with that Act, with the just compensation provision of the Fifth Amendment to the Constitution of the United States and with the applicable decisions of this Court which are cited hereunder.

Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13, 16;
Seaboard Air Line Railway Co. v. United States, 261 U. S. 299;
United States v. Rogers, 255 U. S. 163;
Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a;
Fifth Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals, by deciding that because in this case the agency of the Government intrusted with the acquisition of the land was authorized to purchase same and because the contract was entered into prior to the filing of this proceeding the effect of the contract here involved was to fix the net amount to be received by the landowner for the taking of the land and to exclude the payment of interest notwithstanding the fact that said contract contemplated possible condemnation and provided against delay in the payment of the agreed amount in the event of condemnation by providing that said amount should be paid into Court upon the filing of the condemnation proceeding and notwithstanding the fact that condemnation without reference to the contract and after repudiation thereof was resorted to, has decided an important question of Federal law with reference to Government land acquisition by the use of the condemnation process in conjunction with previously existing contracts as to the amount of compensation, which question has not been but should be settled by this Court.

3. The decision of the Circuit Court of Appeals to the effect that interest is not allowable in this proceeding on that portion of the award for the value of the land as of the date of the taking not paid at the date of the Declaration of Taking has denied petitioner a right which it has specifically set up under the Declaration of Taking Act and under the just compensation provision of the Fifth Amendment to the Constitution of the United States, the denial of which right can now be remedied only by the issuance by this Court of its writ of certiorari.

4. The decision of the Circuit Court of Appeals to the effect that because the consideration for the purchase of the land was fixed by a contract entered into before the condemnation suit was instituted the amount named as such consideration must be taken as the sole compensation

in the condemnation suit regardless of the date of the payment thereof, although the contract contemplated the possible condemnation and the Government had entered into possession of the land under the contract and then repudiated the contract and then filed this proceeding and a Declaration of Taking **is squarely in conflict with the opinion of the Circuit Court of Appeals for the Fifth Circuit in the case of United States v. Baugh, 149 Fed. 2d 190,** in which case **interest was allowed for the period of the delay in the payment of the award arrived at by the Court pursuant to an agreed valuation embodied in a stipulation between the parties** and in which case the Court held in substance that the landowner had the constitutional right to receive **not only compensation for the land as of the date of the taking, but where the taking precedes the payment, such addition as will produce the full equivalent of the value paid contemporaneously with the taking** and also held **that the settled law of the land at the time a contract is made is a part of the contract and must be read into it** and the doctrine of which case is contrary to the proposition that in a condemnation case of this character interest must be denied because of the general rule that interest does not run on contractual claims against the sovereign which proposition, according to the opinion in the Baugh case, was set forth in the only specification of error in the brief of the United States in said case. The conflict between the opinions of these two Circuit Court of Appeals has a tendency to create confusion as to the law and should, we respectfully submit, be terminated by a decision of this Court.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that the said opinion and judgment of said Circuit Court of Appeals in the case of United States of America, Appellant, v. Q. W. S. S. Realty and Investment Company, a Corporation, Appellee, No. 13226 in said Court, be reviewed by this Court as provided by law, and that upon such review said judgment be reversed and the petitioner have such other relief as to this Court may seem appropriate.

SAMUEL M. WATSON,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals in the within cause does not state the reasons for the Court's decision, but refers to the opinion in the Oliver case, a companion case. The opinion in this case may be found on pages 295 and 296 of the record, and the opinion in the Oliver case appears on pages 297 to 303 of the transcript of the printed record on file in connection with this and other cases.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari. Reference will be made to such facts where necessary in the course of this brief.

SPECIFICATIONS OF ERROR TO BE URGED.

1.

It was error for the Circuit Court of Appeals, after first proclaiming the sound proposition of law (R. 300-301), that where after a contract between the Government and a landowner made in contemplation of the acquisition of the land by condemnation and fixing the value of the land for that purpose, the United States acquires possession of the land in the contemplated condemnation proceeding and fails to make payment of the agreed value contemporaneously with the taking, interest must be allowed the owner from the date of the taking until payment, in order that the constitutional requirement of just compensation may be satisfied (R. 300-301), **then to hold** that just compensation does not require payment of interest in **this proceeding** because of the fact that the acquiring agency was authorized to acquire the land by purchase and because of the further fact that the United States acquired possession under the contract, **basing its holding** upon the erroneous assumption that because the parties arrived at an agreed purchase price they did so without reference to just compensation in a constitutional sense and agreed upon the amount of the compensation **not as of the date of the taking**, but without reference to any date whatsoever and without reference to the question as to whether it should eventually be paid after a direct purchase or in the course of a condemnation proceeding which **erroneous assumption** did not take into consideration the fact that **possible acquisition of the land by condemnation was contemplated by the contract** (R. 92-93), and that **the contract provided against delay in payment** by providing that in the event of condemnation the **agreed valuation** of Fifty-two Thousand Dollars ($52,000.00) **should be paid into Court upon the filing of the suit**, and that although the United States

acquired possession under the contract and then retained possession it nevertheless acquired it for the option consideration of $1.00 and not for the Fifty-two Thousand Dollars ($52,000.00) agreed valuation and forfeited the right to possession by repudiating the contract and had to depend upon and resort to condemnation to **regain the right** to the possession which it was already enjoying.

II.

The Circuit Court of Appeals erred in saying: "The landowners are not entitled to insist upon the provisions of the contract favorable to them while rejecting others which are unfavorable" for the reason that said statement implies that the landowners, by insisting upon the payment of interest on the agreed valuation, are rejecting that portion of the contract which provides for immediate possession by the Government upon the acceptance of the option, whereas the landowner is not rejecting that provision but, on the contrary, the benefits thereof were forfeited by the Government by reason of the Government's repudiation of the contract while the landowners' rights to have the agreed valuation in the contract fixed as the value of the land at the date of the taking arises from the fact that the contract established said sum as the agreed valuation of the land (R. 93).

III.

The Circuit Court of Appeals erred in saying, "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States"

(R. 302) for the reason that the "exclusive possession and use from the effective date of the purchase contract until payment by the United States" was by the express terms of the option granted **for the consideration of One Dollar ($1.00) and not for the Fifty-two Thousand Dollar ($52,000.00) consideration** (R. 85, 92), although later forfeited by repudiation.

IV.

The Circuit Court of Appeals erred in holding as follows: "The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest to the United States by way of damages for delay in the payment of an obligation."

V.

The Circuit Court of Appeals erred in reversing the District Court and in entering judgment ordering the cause remanded to the District Court with directions to enter judgment in favor of the appellee Q. W. S. S. Realty & Investment Company for the consideration stipulated in the contract without interest.

SUMMARY OF THE ARGUMENT.

I.

Since the property involved in this proceeding was taken for public use and the payment for a portion of the value thereof was delayed beyond the date of the taking, just compensation as provided by the Fifth Amendment to the Constitution of the United States and by the Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a, requires that the value of the property as of the date of the taking and such additional amount as shall compensate the owner for the delay in payment of that portion not paid on the date of the taking be paid to the owner.

United States v. Rogers, 255 U. S. 163;
Danforth v. United States, 308 U. S. 271;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13.

II.

The fact that the contract involved in this proceeding was entered into prior to the filing of said proceeding and provided for either the acquisition of the land by purchase at an agreed valuation of $52,000.00 or acquisition of the land by condemnation at that figure and that the award of compensation for the land as of the date of the taking was fixed by the court in this proceeding at the agreed valuation contained in the contract, does not prevent the just compensation provision of the Fifth Amendment or Sec. 258 (a) of the Declaration of Taking Act from being applicable and does not prevent the agreed valuation named in the contract from being just compensation for

the land as of the date of the taking since condemnation was actually resorted to.

Contract between the United States and Q. W. S. S. Realty & Investment Company (R. 85-93);
Fifth Amendment to the Constitution of the United States;
Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C. A., Sec. 258 (a);
Danforth v. United States, 308 U. S. 271;
Muschaney v. United States, 324 U. S. 49.

III.

The Fifty-two Thousand Dollar ($52,000.00) sum mentioned in the contract was described therein as the agreed valuation of the land (R. 93) and was that only, and was not in part a consideration also for the grant of immediate possession to the United States as held by the Circuit Court of Appeals (R. 302), that grant having been included in the option before acceptance and conditioned to take effect immediately upon acceptance and before the payment of the Fifty-two Thousand Dollar sum, said option with all of the rights and privileges which it granted to the United States including the said right to possession from and after acceptance thereof having been made, executed and delivered for a valid consideration of One Dollar. The Government, however, forfeited this right to possession granted by the option by repudiating the option and bringing a condemnation suit, which suit was in contravention of the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93);
Opinion of the Circuit Court of Appeals (R. 296-303).

IV.

The said option mentioned above in our paragraph III also provided that in the event of the necessity for condemnation to clear title the land might be acquired by condemnation and that the Government should not be disturbed in its use and occupancy of the land during the pendency of the condemnation proceeding, and this provision was supported not by the Fifty-two Thousand Dollar agreed valuation but by the option consideration of $1.00. The Government, however, forfeited this right to be undisturbed in the use and occupancy of the land during the pendency of the condemnation proceeding by repudiating the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

V.

The contracting parties did not at the time of entrance into the contract contemplate delay in the payment of the agreed valuation, it being natural for them to assume that if title should prove to be satisfactory and if the land should therefore be acquired by purchase, the work of conveyancing would not give rise to an unreasonable delay, and they specifically provided against delay in case of condemnation by providing that in the event thereof the agreed valuation should be placed in the Registry of the Court upon the institution of the proceedings (R. 93).

Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

VI.

While ordinarily claims against the United States lying either in tort or in contract do not bear interest, this Court has often held that the claim of a defendant in a

condemnation proceeding by the United States for compensation for his property does not come within the scope of the rule that interest does not run against the sovereign. The question has never been decided by this Court, however, in a case such as this one in which the amount of the award as to the value of the land as of the date of the taking has been fixed by the court in accordance with a pre-existing agreed valuation in a contract between the parties.

United States v. Rogers, 255 U. S. 163;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, supra.

VII.

Petitioner's prayer in its answer filed in the District Court for the fixing of the award at the agreed valuation contained in the contract and its subsequent insistence thereupon did not amount to the institution and prosecution of a claim in contract against the United States but, on the contrary, was merely **defensive in its nature in a proceeding prosecuted by the United States**, the whole of which could have been dismissed by the United States at any time prior to judgment, and, in fact, **the jurisdiction of the District Court to entertain a claim on a contract is limited by statute to claims amounting to Ten Thousand Dollars or less.**

Tucker Act, Sec. 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

VIII.

The question as to whether interest runs against the United States in a condemnation proceeding in which the award of compensation for the land as of the date of the taking has been fixed in accordance with the agreed valuation contained in a contract between the parties has been

decided adversely by the Circuit Court of Appeals of the Fifth Circuit in the case of United States v. Baugh, 149 Fed. 2d 190, and the Circuit Court of Appeals of the Eighth Circuit in this proceeding and the companion proceedings. This we submit is a very important question of federal law not yet decided by this court which question by reason of the diversity of opinion of the two courts of appeals will create confusion unless and until decided by this Court.

United States v. Baugh, 149 Fed. 2d 190;
Opinion of Circuit Court of Appeals for the Eighth Circuit in the Oliver case (R. 296-303).

ARGUMENT.

I.

When property is taken for public use in a condemnation proceeding and a portion of the value thereof as of the date of the taking is delayed beyond the date of the taking, then such additional amount must be paid as shall compensate the condemnee for having been deprived of both the property and a portion of the money which should have been paid on the date of the taking from said date until the date of payment. No less will satisfy the just compensation provision of the Fifth Amendment to the Constitution. The Declaration of Taking Act of Feb. 26, 1931, 46 Sta.. 1421, c. 307, 40 U. S. C. A., Sec. 258a, has provided that such additional amount shall be measured by interest at the rate of Six Percent per annum on the unpaid portion from the date of the taking to the date of payment. That the foregoing is true requires no citation of authorities because it is admitted by the respondent and stated by the Circuit Court of Appeals in its opinion in the cases under consideration, and it is also stated in said opinion that this case proceeded under the authority of the aforesaid Declaration of Taking Act (R. 300).

II, III and IV.

The Circuit Court of Appeals also goes so far as to say that where a contract between the Government and a landowner contemplating the acquisition of the land by condemnation fixes the value of the land for that purpose and the Government acquires the land in the contemplated condemnation proceeding and fails to make payment of the agreed value contemporaneously with the taking, **interest must be allowed in order to satisfy the constitutional requirement of just compensation**; but the Court says in substance that such is not true in these cases for

the reason that the War Department was authorized to acquire the land by purchase and that under that circumstance the effect of the contract was to bind the parties to an arbitrary and fixed consideration without reference to just compensation in the constitutional sense (R. 301) and for the reason that the purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States.

We submit that these reasons given by the Circuit Court of Appeals for holding that the payment of interest is not required as a part of the just compensation in this case are inadequate. We contend that **since the contract contemplated possible condemnation, and since condemnation was actually resorted to, the fact that the Government had the authority to purchase the land is without significance** and we direct this Court's attention to the fact that the Fifty-two Thousand Dollar consideration was **for the land alone** and not partly for the exclusive possession and use of the land from the effective date of the purchase contract as said by the Circuit Court of Appeals for the reason that said grant of possession was made by the landowner **by the option supported by a consideration of One Dollar before the option was accepted,** although it was conditioned to take effect from and after the date of acceptance (R. 85-92). We also direct the Court's attention to the fact that the provision of the condemnation clause of the contract to the effect in substance that the Government shall not be disturbed in its use and occupancy of the land during the pendency of the condemnation proceeding **also rests on the $1.00 consideration and not on the $52,000.00 consideration,** said provisions having

been a part of the option which was granted to the United States **for a consideration of $1.00** (R. 85, 92, 93). Furthermore, the condemnation provision of the option describes the $52,000.00 consideration as **the agreed valuation** (R. 93).

V.

The Circuit Court of Appeals in its opinion said: "Delay in payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied." We submit that on the contrary the contract specifically provided against delay in payment of the agreed valuation in the event of condemnation by providing that **upon the institution of the proceeding the agreed valuation would be paid into the registry of the Court** (R. 92-93) and it was not apprehended that in the absence of the necessity for a condemnation suit to perfect title there would be any substantial delay in the process of conveyancing.

VI, VII and VIII.

While it is well established that on ordinary claims against the Government, interest does not run, this Court has often held that such rule does not apply in condemnation proceedings. Typical of these holdings is the doctrine expressed in the following quotation from United States v. Rogers, 255 U. S. 163:

> "Was there error in awarding the owners interest on the value of their land appropriated from the time of actual taking of same until compensation was made? It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end be subjected to the payment of interest (citing cases). In the present case the landowners did not sue upon a claim against the Government as was the fact in U. S. v. North American Transportation & Trading Co., 253 U. S. 330. The Government was seeking for purposes au-

thorized by statute to appropriate the lands and it had actually taken them; and it had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran. Having taken the lands of the defendants in error it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

This question however has never been directly decided by this Court in a case in which the award of compensation for the value of the land as of the date of the taking was made by the Court pursuant to an agreed valuation contained in a contract, although the opinion of this Court in Danforth v. United States, 308 U. S. 271, which was such a case, seems to indicate that interest would have been allowed in that case if there had been an actual taking which the Court held there had never been.

We submit, however, that even though the question has never happened to be decided in such a case, there is nevertheless no difference between an award based upon an agreed valuation in a contract and an award arrived at by reference of the question of value to commissioners or a jury which should justify different decisions of this question. This question has been decided diversely by the Circuit Court of Appeals of the Eighth Circuit in these cases and by the Circuit Court of Appeals of the Fifth Circuit in United States v. Baugh, 149 Fed. 2d 190. This diversity of decisions leaves this important question of federal law unsettled until settled by this Court.

We submit that the petitioner, by praying in its answer in the District Court for the fixing of the award at the agreed valuation, was not prosecuting a claim in contract, but was defending itself in an adversary condemnation suit instituted by the Government after repudiation of the contract. In fact, the landowners' effort to have the award fixed at the agreed valuation could have been defeated by the Government at any time by the dismissal of

the condemnation suit; and furthermore, the District Court did not have jurisdiction to entertain a suit on a contract for an amount in excess of $10,000.00 because its jurisdiction is so limited by the statute known as the Tucker Act, 28 U. S. C. A., Sec. 41 (20).

We submit that the Government, having repudiated the contract and having instituted a condemnation suit in violation of the provisions of the contract, lost all of its rights under the contract and subjected itself to all of the provisions of the condemnation law, including the provision for the payment of interest on delayed payments, and was still subject to the contract provision that the award of compensation for the taking of the land must be fixed at the agreed valuation.

In conclusion, we submit that the mere fact that the District Court in the condemnation proceeding determined the value of the land as of the date of the taking in accordance with the agreed valuation in a contract entered into by the parties before the condemnation proceeding was instituted, which contract contemplated possible condemnation and provided that in the event thereof a consent verdict should be entered for the agreed valuation, **did not prevent the just compensation from being determined in the proceeding within the meaning of the Declaration of Taking Act**, but, on the contrary, the parties consented that the value of the land should be determined in the proceeding to be in that amount.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 155.

PETITIONER'S BRIEF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

Q. W. S. S. REALTY AND INVESTMENT COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 155.

PETITIONER'S BRIEF.

OPINIONS BELOW.

The unreported opinion of the District Court in this case rendered by Judge Duncan is found at (R. 36-37). The said opinion refers to and concurs with the opinion of District Judge Moore in similar cases which opinion is reported in 61 F. Supp. 199 (R. 162-180; 249-267). The opinion of the Circuit Court of Appeals in this cause (R. 295-296) is reported at 155 Fed. 2d. 77. This last mentioned opinion recites that the facts in this case are identical with those involved in the Oliver case and that the Oliver case opinion rules this case. The opinion of the Circuit Court of Appeals in the Oliver case (R. 296-303) is reported in 155 Fed. 2d. 73.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229.1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides, in effect, that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit here to be reviewed was originally entered on April 9, 1946 (R. 304-305). A petition for a rehearing was duly filed by petitioner, who was appellee in said Court, on April 24, 1946, within the time provided by the rules of said Court (R. 323), and said petition for a rehearing was denied by said Circuit Court of Appeals on the 30th day of April, 1946 (R. 329), which is the date on which judgment of said Circuit Court of Appeals became final.

In said cause said petitioner specifically set up and claimed a right under the Constitution of the United States, being the just compensation provision of the Fifth Amendment thereto, and under the Statutes of the United States and particularly United States Code Annotated, Title 40, Sec. 258(a), 258(e), which rights were denied by the decision and judgment of said Circuit Court of Appeals.

STATEMENT.

This suit is a condemnation suit against this petitioner and its tract of land known as tract No. 174 and alleged to contain 356.51 acres of land in St. Charles County, Missouri, for the acquisition of fee simple title to said land by the United States for use by the War Department as a site for a T. N. T. manufacturing plant (R. 63-74). The petition was filed April 9, 1941 (R. 63). **The petition alleged that the action was brought pursuant to the order of the Secretary of War under authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C., Sec. 257, as amended)** and pursuant to the authority of the Act approved July 2, 1917, Title 50, U. S. C., Sec. 171, as amended, and of certain appropriating acts.

The aforesaid Act of August 1, 1888 (25 Stat. 375, 45 U. S. C., Sec. 257) was amended by the Act of Feb. 26, 1931 (46 Stat. 1421) commonly known as the Declaration of Taking Act. The petition in its prayer prays for an order under this last mentioned act "**decreeing to the plaintiff the right to take immediate possession of said lands** * * *" (R. 73). **The aforesaid Declaration of Taking Act (46 Stat. 1421), Title 40 U. S. C., Sec. 258 (a), specifically provides for the payment of interest on delayed payments in condemnation cases.**

A Declaration of Taking as to this land and other land had been filed by the United States on April 7, 1941, in case No. 770 in the District Court (R. 74). This Declaration of Taking also alleged that the land was to be taken under authority of the said **Act of Feb. 26, 1931 [46 Stat. 1421, 40 U. S. C., Sec. 258 (a)] known as the Declaration of Taking Act** (R. 74).

An order and judgment on said Declaration of Taking was entered by the District Court on April 9, 1941 (R. 79-83).

On April 7, 1941, the date of the filing of the aforesaid

Declaration of Taking, the estimated compensation for the land involved in this case in the amount of $15,280.00 was deposited in the Registry of the Court (R. 78).

On April 9, 1941, the District Court ordered said sum of $15,280.00, the estimated compensation, transferred from case No. 770 to this case which bore District Court No. 800 (R. 84).

To this condemnation petition filed as aforesaid in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri this petitioner, being defendant in the said District Court, filed an answer on May 19, 1941 (R. 84-95), in which it alleged that it had entered into a contract in the form of an option granted to the United States to purchase the land involved for $52,000.00, which option was executed by it on Nov. 25, 1940, and accepted by the United States on Nov. 30, 1940. The petitioner, then defendant, set forth said option contract in full in said answer (R. 85-93) and alleged in substance that it had performed its obligations under said contract and that the United States had been granted possession of the land thereunder and had accepted same but had not paid the agreed consideration (R. 93 and 94) and prayed for a dismissal of the condemnation suit and for the setting aside of the order and judgment of taking (R. 95).

However, on April 2, 1945, this petitioner, then defendant in the District Court, by leave of court filed its amended answer in said District Court consenting to the condemnation proceeding and praying in substance that plaintiff's prayer for the fixing of the award for the value of the land in accordance with the report of three disinterested commissioners to be appointed by the Court be denied and that the award be fixed at $52,000.00, the agreed valuation of the land set forth in the contract, plus interest on the whole sum of $52,000.00 at the rate of 6% per annum from Nov. 30, 1940, the date of the surrender of possession, to April 9, 1941, the date of the payment

of the estimated compensation into the Registry of the Court, plus interest on the difference between such estimated compensation and the $52,000.00 agreed valuation at 6% per annum from the date of the deposit of the estimated compensation to the date of the deposit of the additional amount in the Court Registry.

This option was given by this petitioner on Nov. 25, 1940, **for a consideration of One Dollar ($1.00)** and the landowner thereby agreed **for that $1.00 consideration,** if the option should be accepted by the United States within thirty days, to sell the land described therein to the United States for $52,000.00 (R. 85) **and for the same $1.00 consideration this option granted to the United States the right of immediate occupancy and use of the land for any purpose whatsoever from and after acceptance of the option by the Government until such time as the land should be conveyed to the Government and the purchase price paid (R. 92).**

The United States, however, having first entered into possession of the land under the authority of the aforesaid grant of possession contained in said option then repudiated said option and filed this proceeding, not in accordance with the option, but as above set forth under the authority of the aforesaid **Declaration of Taking Act,** and estimated the compensation at $15,280.00 instead of the $52,000.00 option price and paid said $15,280.00 into Court at the time of the filing of suit.

Meanwhile, two other cases involving other lands in the same area and involving similar contracts were tried by the District Court. In both of these cases the defendants in their respective answers had prayed for the fixing of the award for the taking of the land at the agreed valuation in the contract and the defendant in one of the cases had prayed for the allowance of interest in the pleading upon which the case went to trial. In both cases the plaintiff had contended that the alleged contract was invalid.

Pending the final outcome of these two cases the United States had taken no further action in the case at bar or any of the numerous condemnation cases arising out of the Weldon Spring ordnance project.

The District Court, after trial of the two above mentioned cases, entered a decree in each of them holding the contract valid and fixing the award for the taking of the land at the agreed valuation set forth in the option contract and **allowing interest on the whole amount of the award from the date of the taking of possession to the date of payment of the estimated compensation into court and on the difference between the estimated compensation and the amount awarded from the date of the deposit of the estimated compensation to the date of payment of the amount of said difference.**

The plaintiff then had appealed to the United States Circuit Court of Appeals but had **utterly failed in its brief in that court to specify any error in the allowance of interest** but had directed its whole attack against the alleged invalidity of the contract. The Circuit Court of Appeals, in a joint opinion entitled United States v. Muschaney et al., and United States v. Andrews et al., 139 Fed. (2d) 661, had reversed the District Court in each case and had held that the respective contracts were invalid; whereupon the appellees in each case had applied for and been granted writs of certiorari by this Court and later this Court had in a joint opinion, being Muschaney v. United States and Andrews v. United, 324 U. S. 49, reversed the Circuit Court of Appeals, holding the contracts valid and holding that the award for the value of the land should be fixed at the agreed valuation in the contract and had remanded the cases to the District Court with directions for further proceedings in accordance with the opinion of this Court. **Since the Government had failed in its appeal to present the interest question either to the Circuit Court of Appeals or to this Court,**

both the Circuit Court of Appeals and this Court had naturally been silent on the subject of interest in their respective opinions.

Thereafter the United States, recognizing the validity of the option contract in view of the opinion of this Court in the Andrews and Muschaney cases, filed a motion for judgment in each similar condemnation case, including the case at bar, in which motion it cited the opinion of this Court in the Andrews and Muschaney cases above mentioned and prayed for judgment for plaintiff in condemnation and for the defendant for the contract valuation **without interest.** A motion of this character was filed in the case at bar on March 20, 1945 (R. 95).

On April 3, 1945, this petitioner, then defendant, filed a counter-motion for judgment for the plaintiff in condemnation and for the defendant for the contract valuation of $52,000.00 plus interest on said sum at the rate of 6% per annum on said amount from November 30, 1940, the date upon which it surrendered possession of the land, to April 9, 1941, the date upon which the estimated compensation was paid into court plus interest at said rate on the difference between said sum of Fifty-two Thousand Dollars ($52,000.00) and the amount of the estimated compensation paid into Court on April 9, 1941, for a period of time extending from said deposit date of April 9, 1941, to the date upon which said difference should be deposited in the Registry of the Court (R. 100-101), which said last mentioned date later turned out to be May 17, 1945 (R. 101-102).

This case, along with numerous other cases involving the same question, was heard on April 4, 1945. Each of the three District Judges, namely, Judge Moore, Judge Hulen and Judge Duncan, had some of these cases set for the last mentioned date, and in view of the similarity of the cases all three Judges sat together and heard the cases, but each Judge decided his own cases independently of the other two Judges.

The result was that Judges Moore and Duncan each reached a decision that the defendants **were entitled to interest on the difference between the amount of the estimated compensation and the amount of the final award based upon the agreed valuation in the contract for the period extending from the date of the deposit of the estimated compensation to the date upon which the said difference should be deposited, but that the defendants were not entitled to interest on the whole award from the date of the surrender of possession to the date of the deposit of the estimated compensation.** Judge Hulen decided in his cases that **no interest whatever should be awarded.** The case at bar happened to be one of the cases decided by Judge Duncan (R. 103-104). A decree in accordance with the above mentioned decision of Judge Duncan was entered on November 26, 1945. This petitioner did not appeal from the disallowance of interest on the whole amount from the date of surrender of possession to the date of the deposit of the estimated compensation, but the United States did appeal to the Circuit Court of Appeals from the allowance of interest to the extent that it was allowed (R. 55). Said appeal was consolidated with three similar appeals and a joint record in all four appeals was compiled and printed (R. 287-288). The four appeals were argued together before the Circuit Court of Appeals.

Meanwhile, an appeal of Lola Castlio Oliver and A. Ray Oliver, her husband, and Mrs. B. I. Castlio from the decision of Judge Hulen disallowing all interest in a similar case had been filed, perfected and submitted.

Thereafter, on April 9, 1946, the Circuit Court of Appeals rendered its decision and filed its opinion in said Oliver case, being case No. 13174 on the docket of the Circuit Court of Appeals of the Eighth Circuit, affirming the opinion of Judge Hulen which had disallowed interest (R. 296-303) and on the same day said Court entered a joint opinion reversing the District Court in this case and

the other three cases with which it was jointly submitted and referring to the reasons given for not allowing interest embodied in the opinion in the Oliver case (R. 295-296).

Concluding this statement we call attention to the fact that the contract involved in this case, which was identical with the contract involved in all of the other cases, provided for the purchase and sale of the land by the parties thereto but provided for condemnation in the event it was deemed necessary for the purpose of clearing the title, and provided that in the event of such condemnation the award should be fixed by a consent verdict at the **agreed valuation in the option** and that upon the filing of the petition a deposit of the **agreed amount** should be made with the Clerk of the Court (R. 92 and 93).

We also call attention to the fact that the Government went into possession **under the contract** and subsequently repudiated the contract and sought to acquire the land independently of the contract as shown by the opinion of the Circuit Court of Appeals at one point where it mentions the United States **as having repudiated its purchase contract** (R. 301) and at another point in its opinion where it mentions the fact that the United States did not proceed with condemnation proceedings **as contemplated by the purchase contract** but under the mistaken belief that the contract was void (R. 302).

SPECIFICATIONS OF ERROR TO BE URGED.

I.

It was error for the Court while admitting that when after an agreed valuation in a contract the Government acquires possession in a condemnation suit contemplated by the contract and does not pay the agreed valuation contemporaneously with the taking interest must be allowed on the agreed value from the date of the taking until payment in order to satisfy the constitutional provision for just compensation (R. 300-301) nevertheless to hold that just compensation does not require the payment of interest in this proceeding (R. 301).

II.

The Circuit Court of Appeals erred in saying: "The landowners are not entitled to insist upon the provisions of the contract favorable to them while rejecting others which are unfavorable" (R. 302), for the reason that said statement implies that the land owners by insisting upon the payment of interest and so much of the agreed valuation as was not paid into Court by the Government at the time of the filing of the condemnation suit are rejecting that portion of the contract which provides for immediate possession upon acceptance of the option, whereas it was the Government and not the landowners that nullified all provisions of the contract favorable to the Government and forfeited all Government rights thereunder by repudiating the contract as evidenced by its seeking by condemnation under the Declaration of Taking Act to acquire the fee simple title to the land and the right to possession which possession it held as a trespasser after repudiation of the contract.

III.

The Circuit Court of Appeals erred in saying, "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation but the agreed consideration to be paid the landowners by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States" (R. 302) for the reason that the "exclusive possession and use from the effective date of the purchase contract until payment by the United States" was by the express terms of the option granted for the consideration of One Dollar ($1.00) and not for the Fifty-two Thousand Dollar ($52,000.00) consideration (R. 85, 92), although forfeited by repudiation.

IV.

The Circuit Court of Appeals erred in holding as follows: "The allowance of interest upon the consideration stipulated in the purchase contract would be tantamount to awarding interest against the United States by way of damages for delay in the payment of an obligation" (R. 303).

V.

The Circuit Court of Appeals erred in reversing the District Court and in entering judgment ordering the cause remanded to the District Court with directions to enter judgment in favor of the appellee Q. W. S. S. Realty & Investment Company for the consideration stipulated in the contract without interest.

SUMMARY OF THE ARGUMENT.

I.

Since the property involved in this proceeding was taken for public use and the payment for a portion of the value thereof was delayed beyond the date of the taking, just compensation as provided by the Fifth Amendment to the Constitution of the United States and by the Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C., Sec. 258a, requires that the value of the property as of the date of the taking and such additional amount as shall compensate the owner for the delay in payment of that portion not paid on the date of the taking be paid to the owner.

United States v. Rogers, 255 U. S. 163;
Danforth v. United States, 308 U. S. 271;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, 299 U. S. 476;
Jacobs v. United States, 290 U. S. 13.

II.

The fact that the contract involved in this proceeding was entered into prior to the filing of said proceeding and provided for either the acquisition of the land by purchase at an agreed valuation of $52,000.00 or acquisition of the land by condemnation at that figure and that the award of compensation for the land as of the date of the taking was fixed by the court in this proceeding at the agreed valuation contained in the contract, does not prevent the just compensation provision of the Fifth Amendment or Sec. 258 (a) of the Declaration of Taking Act from being applicable and does not prevent the agreed valuation named in the contract from being just compensation for

the land as of the date of the taking since condemnation was actually resorted to.

Contract between the United States and Q. W. S. S. Realty & Investment Company (R. 85-93);
Fifth Amendment to the Constitution of the United States;
Declaration of Taking Act of Feb. 26, 1931, 46 Stat. 1421, C. 307, 40 U. S. C. A., Sec. 258 (a);
Danforth v. United States, 308 U. S. 271;
Muschaney v. United States, 324 U. S. 49.

III.

The Fifty-two Thousand Dollars ($52,000.00) sum mentioned in the contract was described therein as the agreed valuation of the land (R. 93) and was that only, and was not in part a consideration also for the grant of immediate possession to the United States as held by the Circuit Court of Appeals (R. 302), that grant having been included in the option before acceptance and conditioned to take effect immediately upon acceptance and before the payment of the Fifty-two Thousand Dollar sum, said option with all of the rights and privileges which it granted to the United States, including the said right to possession from and after acceptance thereof having been made, executed and delivered for a valid consideration of One Dollar. The Government, however, forfeited this right to possession granted by the option by repudiating the option and bringing a condemnation suit, which suit was in contravention of the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93);
Opinion of the Circuit Court of Appeals (R. 296-303).

IV.

The said option mentioned above in our paragraph III also provided that in the event of the necessity for condemnation to clear title the land might be acquired by condemnation and that the Government should not be disturbed in its use and occupancy of the land during the pendency of the condemnation proceeding, and this provision was supported not by the Fifty-two Thousand Dollar agreed valuation but by the option consideration of $1.00. The Government, however, forfeited this right to be undisturbed in the use and occupancy of the land during the pendency of the condemnation proceeding by repudiating the option.

Option Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

V.

The contracting parties did not at the time of entrance into the contract contemplate delay in the payment of the agreed valuation, it being natural for them to assume that if title should prove to be satisfactory and if the land should therefore be acquired by purchase, the work of conveyancing would not give rise to an unreasonable delay, and they specifically provided against delay in case of condemnation by providing that in the event thereof the agreed valuation should be placed in the Registry of the Court upon the institution of the proceedings (R. 93).

Contract between the United States and Q. W. S. S. Realty & Investment Co. (R. 85-93).

VI.

While ordinarily claims against the United States lying either in tort or in contract do not bear interest, this Court has often held that the claim of a defendant in a condem-

nation proceeding by the United States for compensation for his property does not come within the scope of the rule that interest does not run against the sovereign.

United States v. Rogers, 255 U. S. 163;
Smyth v. United States, 302 U. S. 329;
Shoshone Tribe of Indians v. United States, supra;
United States v. Baugh, 149 Fed. 2d 190.

VII.

Petitioner's prayer in its answer filed in the District Court for the fixing of the award at the agreed valuation contained in the contract and its subsequent insistence thereupon did not amount to the institution and prosecution of a claim in contract against the United States but, on the contrary, was merely **defensive in its nature in a proceeding prosecuted by the United States**, the whole of which could have been dismissed by the United States at any time prior to judgment, and, in fact, **the jurisdiction of the District Court to entertain a claim on a contract is limited by statute to claims amounting to Ten Thousand Dollars or less.**

Tucker Act, Sec. 24 (20) of the Judicial Code, 28 U. S. C. A., Sec. 41 (20).

ARGUMENT.

I, II AND III.

The property involved in this proceeding was taken by the United States in a condemnation proceeding and was not acquired by purchase. While it is true that long prior to the institution of this proceeding a contract had been entered into first in the form of an option which when accepted became a contract of purchase and sale this contract after the Government had taken possession under the terms of the option and had duly accepted the option was repudiated and disowned by the Government, and the Government then undertook to acquire the title to the land by condemnation under the Declaration of Taking Act and also so to acquire the right to the possession, **which it had wrongfully held since its repudiation of the contract.** Furthermore, it undertook to acquire said ownership and right of possession **for a consideration other than that named in the contract** (Respondent's Brief in Opposition, pages 5 and 6). It did acquire title to the land and the right to possession by virtue of a judgment on the Declaration of Taking filed in this proceeding and not by virtue of the contract (Respondent's Brief in Opposition, page 6).

This Court has held in two companion cases arising out of the same acquisition project and involving identical contracts and condemnation procedure that title to the land there involved passed to the Government by virtue of the Declaration of Taking in the following words:

> "In the two condemnation proceedings instituted against petitioners, judgments were entered upon a Declaration of Taking which vested titles in the United States, 46 Stat. 1421." Muschaney v. United States, 324 U. S. 49.

There can, therefore, be no doubt that in the case at bar title to the land involved was acquired by condemnation under the Declaration of Taking Act, 46 Stat. 1421. Section 258 (a) of said act specifically provides for the payment of interest at the rate of six percentum per annum on the delayed portion of the value of the land. Declaration of Taking Act, 46 Stat. 1421, Title 40, U. S. C., Sec. 258 (a).

The value of the land here involved was determined in this proceeding to be the amount described in the option as the agreed valuation, an amount less than that having been paid into Court at the time of the Declaration of Taking as estimated compensation. We submit that under this state of the facts and the law there can be no doubt that petitioner is entitled to interest on the difference between the estimated compensation placed in Court and the agreed valuation from April 9, 1941, the date of the deposit of the estimated compensation in the registry of the Court until May 17, 1945, the date of the deposit of said difference.

Furthermore, the payment of interest under the circumstances here existing is required not only by the aforesaid Declaration of Taking Act, but also by the just compensation provision of the Fifth Amendment to the Constitution of the United States as that provision has been construed by this Court again and again. United States v. Rogers, 255 U. S. 163; Danforth v. United States, 308 U. S. 271; Smyth v. United States, 302 U. S. 329; Shoshone Tribe of Indians v. U. S., 299 U. S. 476; Jacobs v. U. S., 290 U. S. 13.

The Circuit Court of Appeals admits the general proposition that even where a contract has been made between the Government and a landowner in contemplation of acquisition of land by condemnation and fixing the value of the land for that purpose and the Government acquires possession of the land in the contemplated condemnation proceeding and fails to make payment of the agreed value

contemporaneously with the taking, interest must be allowed the owner from the date of the taking until payment in order that the constitutional requirement of just compensation may be satisfied and the Circuit Court of Appeals says that this is the doctrine of the Danforth case, 308 U. S. 271 (R. 301). The Circuit Court of Appeals then undertakes to distinguish the facts in the cases now under consideration from the facts in the general proposition last above set forth by contending that since the Secretary of War was authorized by law to purchase the lands here involved the effect of the contract here involved was to fix the net amount to be received by the landowner from the United States for the taking of the land either by purchase or by condemnation (R. 301) and that therefore the facts here involved are different from the facts assumed in the foregoing general proposition.

It is interesting to note in this connection that Section 4 of the Flood Controls Act, 45 Stat. 534, Title 33, USCA, Sec. 702d, under which the condemnation in the Danforth case was brought also gave to the Secretary of War the right to acquire either by purchase or by condemnation and we point out that in the opinion in that case the Court clearly indicated that if there had been a taking which the Court held there had not been the landowner would have been entitled to interest.

The Circuit Court of Appeals contends that the effect of the contracts here involved was to bind the parties to a consideration which might be either greater or less than just compensation in the constitutional sense and says that by these contracts the United States acquired possession and use of the land until title should vest by the payment of the purchase price (R. 301). We believe that these findings of the Circuit Court of Appeals are erroneous and should be carefully considered.

We point out that the contract described the considera-

tion for the land specified as an agreed valuation (R. 93) and we contend that if the parties agreed that this sum represented the value of the land that fact creates a presumption that said sum was the true value which presumption has never been overcome by any evidence to the contrary. The fact that certain commissions and title fees and other expenses were to be paid out of said sum does not prevent it from representing the value for the reason that it is customary for the expenses of the sale to be paid out of the sale value of the land, just as the expense of defending a condemnation suit is paid out of the condemnation award. There is nothing in either the constitution or the statute limiting the meaning of the term "just compensation" to a sum arrived at in any specified manner. The essence of both the constitutional and the statutory provision is that **there must be compensation and that that compensation must be just.** The Court must have considered it just to give effect to the contract valuation, otherwise it would not have done so. Since the consideration for the land specified in the contract is described by said contract as the agreed value of the land and since the Court gave effect to this contract provision said sum is bound to represent just compensation for deprivation of title and possession and since a portion of said just compensation for deprivation of possession was withheld from April 9, 1941 to May 17, 1945, certainly this petitioner is entitled to further just compensation for delay in payment. United States v. Rogers, 255 U. S. 163; Seaboard Airline Ry. Co. v. U. S., 261 U. S. 299, 305-306. It is admitted by respondent that interest on the value of the property from the date of taking until payment is a good measure of such further compensation (Respondent's Brief, page 9).

We now advert to the above mentioned statement of the Court of Appeals to the effect that by these contracts the

United States acquired possession and use of the land until title should vest by the payment of the purchase price and in this connection we desire to consider the following further statement in the opinion of the Circuit Court of Appeals: "The purchase price stipulated in the contract is not merely the agreed fair value of the land made in contemplation of its acquisition by the United States through condemnation, but the agreed consideration to be paid the landowenrs by the United States for both the land and its exclusive possession and use from the effective date of the purchase contract until payment by the United States" (R. 302).

With reference to the first of the two last above quoted statements in said opinion we comment that any right to possession acquired by the United States by reason of said contract **ceased** with the repudiation of the contract by the Government and it then acquired both the right of possession and the fee simple title by the condemnation process. That the condemnation resorted to was in contravention of the contract is established not only by Respondent's own admission (Respondent's brief in opposition, pages 5 and 6), but by the fact that when it filed the proceeding it defied that provision of the contract requiring it in the event of condemnation to pay the sum representing the agreed valuation into Court at the time of the filing of the petition (R. 92-93) and paid a newly estimated value into Court and prayed that the award be made by commissioners appointed by the Court (Respondent's brief, page 5).

With reference to the second of the last above quoted statements, to the effect that the purchase price mentioned in the option was a consideration for both the value of the land and its exclusive possession and use from the effective date of the contract until payment, we comment that it cannot be true, first, for the reason that the contract itself

described the designated sum as the "agreed valuation" (R. 93), and, second, for the reason that the grant of possession **was contained in the option itself before acceptance thereof, conditioned to take effect from and after the date of acceptance, and said grant was supported by the $1.00 consideration which ... the consideration for the option itself and not by the larger consideration designated by the option as the selling price of the land** (R. 85) and later described therein as the "agreed valuation" (R. 93).

The Circuit Court of Appeals seems to utterly ignore the effect upon the contract rights of the Government **flowing from its repudiation of the very contract which created those rights,** and we contend that when we say that respondent lost its contract rights by repudiation we cannot be said to be attempting to penalize respondent for the nonperformance of its contract. On the contrary, said loss of right flowed from respondent's own act of repudiation and was not in any sense contributed to by any act of petitioner.

Petitioner, however, did not repudiate the contract and therefore did not lose its contract right in the event of condemnation to have the award for the value of the land fixed at the agreed valuation, and its insistence thereon was insistence upon a right incident to the law of condemnation as established by the case of Danforth v. U. S., 308 U. S. 271, and Muschaney v. U. S., 324 U. S. 49, and was not in any sense an action for breach of contract or specific performance.

The position of the Circuit Court of Appeals that the agreed valuation does not represent just compensation for the land as of the date of the taking within the meaning of that term as used in the Constitution and the Declaration of Taking Act is based upon its above mentioned holding to the effect that said sum was the consideration for

both the land and its exclusive possession and use from the effective date of the contract, which holding we believe we have hereinabove entirely refuted by reference to the provisions of the contract itself.

IV.

It has been contended by respondent that since the contract granted the undisturbed use and occupancy of the land to the Government pending condemnation petitioner is not entitled to compensation for delayed payment because it contracted away its right to possession during the pendency of condemnation for the sum designated in the option as the agreed valuation. In answer to this contention we again call attention to the fact that this right to use and occupancy during such period **was granted by the option before its acceptance and was supported not by the larger consideration, but by the $1.00 consideration upon which the option rested,** and was conditioned to take effect after acceptance and then only in the event of a resort to condemnation to clear title. **This contract right vested in the Government** by the option was, of course, **extinguished by the Government's subsequent repudiation of the contract and its filing of a condemnation suit not for the purpose or of the kind contemplated by the contract.**

V.

The Circuit Court of Appeals makes the following statement: "Delay in the payment of the agreed compensation for the time necessary to clear title by condemnation or otherwise is clearly implied" (R. 302). We submit that this statement of the Court is utterly at variance with the truth and overlooks the following provision of the option: "If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to

acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all of the terms and provisions of this option and will **upon filing its petition in such proceedings deposit said agreed purchase price with the Clerk of said Court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings**" (R. 92-93). It is perfectly obvious that the provision for payment of the agreed valuation into the registry of the Court at the time of the filing of the petition was designed to avoid delay in payment during the pendency of a condemnation suit. The contracting parties were evidently willing for such delay in payment as might be occasioned by the ordinary mechanics of conveyancing but if a condemnation suit was to be resorted to they wanted payment at the date of filing.

VI AND VII.

The Circuit Court of Appeals says: "The fact that the United States did not proceed with condemnation proceedings as contemplated by the purchase contract, but under the mistaken belief that the contract was void, cannot justify the award of interest not required by the contract. In the absence of a statute or an express contract provision for it interest cannot be added to an obligation of the United States" (R. 302). We suggest that this statement just quoted fails to take into consideration the just compensation provision of the Fifth Amendment to the Constitution and Section 258 (a) of the Declaration of Taking Act. The outstanding fact in this case is that this is a condemnation proceeding and that the law of condemnation embodied in the Constitution, the statutes and the decisions of this Court, calls for the payment of interest on the delayed portion of the value of the prop-

erty taken, which was not paid for at the date of the taking in order that there may be just compensation.

Both the Respondent and the Circuit Court of Appeals have undertaken to restrict the meaning of the term just compensation to such compensation as has been arrived at by commissioners or a jury and they exclude from their definition of the term any compensation arrived at by agreement between the parties. We submit, however, that **in view of the existence of an agreed valuation embodied in a contract the fixing of the compensation for the land at any sum other than the agreed valuation would have been unjust compensation.** Instead of it being true as said by the Circuit Court of Appeals that the contract price may be greater or less than just compensation, we suggest that **where there is a contract fixing an agreed valuation the only possible sum that can represent just compensation is that agreed valuation.** If this be true and a portion of the value of the property is withheld at the date of the taking then there has not been just compensation **unless the landowner is compensated for the delay.**

While it is well established that in ordinary claims against the Government, interest does not run, this Court has often held that such rule does not apply in condemnation proceedings. United States v. Rogers, 255 U. S. 163; Danforth v. United States, 308 U. S. 271; Smyth v. United States, 302 U. S. 329; Shoshone Tribe of Indians v. United States, 299 U. S. 476; Jacobs v. United States, 290 U. S. 13. Typical of these holdings is the doctrine expressed in the following quotation from United States v. Rogers, 255 U. S. 163:

> "Was there error in awarding the owners interest on the value of their land appropriated from the time of actual taking of same until compensation was made? It is unquestionably true that the United States, upon

claims made against it cannot in the absence of a statute to that end be subjected to payment of interest. In the present case the landowners did not sue upon a claim against the Government as was the fact in U. S. v. North American Transportation and Trading Company, 253 U. S. 330. The Government was seeking for purposes authorized by statute to appropriate lands and it had actually taken them; and it had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran. Having taken the lands of the defendants in error it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

We submit that the mere fact that the landowner asked the Court in this condemnation proceeding to fix the award for the taking of the land at the agreed valuation embodied in the contract did not convert this proceeding from a condemnation proceeding instituted and prosecuted by the Government into a suit on a contract against the Government. The Government continued to be the plaintiff in acutuality and the position of the landowner continued to be entirely defensive. The Government could have dismissed its suit at any time prior to judgment and if it had done so such action would have left the landowner without any standing in Court in this proceeding. The Government chose its forum when it filed a condemnation suit and the landowner met the Government in that forum and availed itself of the condemnation law as it found it expressed in the Danfourth and Muschaney cases, supra. In fact the District Court's jurisdiction to entertain suits on contract was limited by statute to matters involving $10,000.00 or less. Tucker Act, 28 U. S. C. A., Section 41 (20). We desire to direct the attention of the Court to the case of United States v. Baugh, 149 Fed. 2d 190, in which the Circuit Court of Appeals of the Fifth Circuit approved the payment of interest upon an award based upon an agreed valuation.

CONCLUSION.

In conclusion we direct the attention of the Court to the fact that in the two Weldon Spring cases that have heretofore been before this Court interest was allowed on the delayed portion of the compensation and that the decrees providing therefor remain unimpaired and the interest in these cases will doubtless be paid in the course of time. These are the cases of Andrews v. United States and Muschaney v. United States, 324 U. S. 49. **Although the decrees reviewed by this Court in those cases provided for interest the Government failed to raise the issue at that time** but has raised it in the cases now under consideration.

We respectfully submit that if the extreme legalisms resorted to by respondent and concurred in by the Circuit Court of Appeals in order to deny interest to this petitioner and many others are allowed to prevail the ends of Justice will be sadly frustrated. The people in the Weldon Spring Ordnance Area were deprived of their farm homes at a time when had they been paid promptly, they could have bought other farms and continued production of farm products on a basis profitable to themselves and beneficial to their country. Through four long years they were deprived of the major portion of the compensation for their land which was eventually allowed by the Court and when at last they did receive the award farm prices had soared to a point which prevented them from obtaining other farms as good as they had been deprived of and meanwhile they had been without the normal income from the land that they had lost. It is highly questionable whether interest at the rate of 6% per annum would compensate them, but that of course, is all that they can ask for.

Respectfully submitted,

SAMUEL M. WATSON,
Attorney for Petitioner.

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Nos. 148-151 and 155

In the Supreme Court of the United States

OCTOBER TERM, 1946

EDGAR S. ALBRECHT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EDWARD J. LINNENBRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

DENNIS B. PITMAN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

A. RAY OLIVER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

Q. W. S. S. REALTY AND INVESTMENT COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 148

EDGAR S. ALBRECHT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 149

EDWARD J. LINNENBRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 150

DENNIS B. PITMAN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 151

A. RAY OLIVER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 155

Q. W. S. S. REALTY AND INVESTMENT COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court in No. 151 (R. 47–52) is reported at 60 F. Supp. 741. The opinion of the district court in Nos. 149 and 150 is reported at 61 F. Supp. 199 (R. 162–180, 249–267).[1] The unreported opinion of the district court in Nos. 148 and 155 is found at R. 36–37, 103–104. The opinion of the circuit court of appeals in No. 151 (R. 77–84)[1] is reported at 155 F. 2d 73 and in Nos. 148–150 and 155 (R. 295–296) at 155 F. 2d 77.

JURISDICTION

The judgments of the circuit court of appeals were entered on April 9, 1946 (R. 303–306; No. 151, R. 85). Petitions for rehearing were denied on April 30, 1946 (R. 321, 329, 341, 349; No. 151, R. 99). The petitions for writs of certiorari were filed on June 7, 1946, in Nos. 148–151 and on June 8, 1946, in No. 155. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is obligated to pay interest upon an award in condemnation proceed-

[1] The records in Nos. 148–150 and 155 were consolidated and will be referred to as "R." without further identification. The record in No. 151 will be referred to as "No. 151, R."

ings where no determination of just compensation is made but where the award is fixed at the insistence of the landowner in the amount set by a contract, which gave the United States the right of possession prior to payment and made no provision for interest.

STATUTES INVOLVED

The pertinent provisions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. secs. 258a–258e, are set out in the Appendix, *infra*, pp. 19–22.

STATEMENT

These cases are among a large number of proceedings brought by the United States to condemn the fee simple title to certain lands in St. Charles County, Missouri, for the Weldon Spring Ordnance Plant (see R. 297, 295–296). The efforts of the War Department to acquire the land for the ordnance plant, its acceptance of approximately 270 contracts for the purchase of the land needed, and its subsequent unsuccessful attempt to repudiate all the contracts which had not been fully executed upon concluding that the contracts were invalid are detailed in the opinions in *United States* v. *Certain Land Situate in St. Chas. Co.*, 46 F. Supp. 921 (E. D. Mo.), reversed *sub nom. United States* v. *Muschany*, 139 F. 2d 661 (C. C. A. 8), reversed *sub nom. Muschany* v. *United States*, 324 U. S. 49. In the latter case,

this Court upheld the validity of the contracts. The petitions at hand involve several of the contracts which in their material portions are identical with those involved in the *Muschany* case, *supra*.

About six months prior to the institution of the various condemnation proceedings, the petitioners granted to the United States options to purchase their lands at fixed prices (R. 27–29, 85–93, 149–151, 237–242; No. 151, R. 36–38). These offers were duly accepted on behalf of the United States (R. 29, 93, 151, 242; No. 151, R. 38). The contracts thus executed granted to the Government the right of immediate occupancy and use of the lands for any purpose whatsoever from and after the acceptance of the options until such time as the lands should be conveyed to the Government, the titles approved by the Attorney General of the United States and the agreed purchase prices paid (R. 28, 92, 150, 241; No. 151, R. 37). The contracts provided that the landowners would convey titles free of all liens and encumbrances and, if necessary, make the titles merchantable and that the purchase prices would be paid when certificates showing the titles to be vested in the United States were furnished (R. 28, 92, 150, 241; No. 151, R. 37). The contracts further provided that (R. 29, 92–93, 151, 242; No. 151, R. 37–38):

> If for any reason the title to the land is not approved by the Attorney General, the

Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

The United States took possession under the contracts (R. 23, 93, 151, 230; No. 151, R. 17–20, 26). Thereafter it sought to repudiate the contracts and to acquire the lands by condemnation proceedings which were instituted by the filing of petitions requesting that commissioners be appointed to determine, assess and award compensation (R. 9, 63, 129, 264; No. 151, R. 4). Declarations of taking were filed with the petitions pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, c. 307, sec. 1, 40 U. S. C. 258a, and estimated compensation in amounts substantially less than the contract

prices was deposited in court (R. 15, 74, 137, 216; No. 151, R. 10).[2] Judgments were entered on the declarations of taking stating that title in fee simple absolute to each of the tracts had vested in the United States and ordering possession to be immediately surrendered to the United States (R. 18, 79, 140, 221; No. 151, R. 15).

Petitioners filed answers (R. 21–29, 84–95, 143–153, 228–242; No. 151, R. 17–26) setting forth the purchase contracts, alleging among other things that the United States had taken possession under the contracts and that they had performed their part of the contracts. Insisting upon the validity of the contracts, petitioners sought to have judgments entered fixing the awards at the agreed purchase prices.[3] Two of them asked for interest from the date of possession (R. 153, 235–236) and one from the date of the acceptance of the contract

[2] See the following table:

Case No.	Contract Price	Estimated Just Compensation Deposited in Court	Excess of Contract Price Over Deposit
No. 148	$21,425.00 (R. 22)	$2,232.00 (R. 18)	$19,193.00
No. 149	34,000.00 (R. 149)	16,000.00 (R. 136)	18,000.00
No. 150	35,000.00 (R. 237)	14,600.00 (R. 221)	20,400.00
No. 151	70,000.00 (R. 36)	21,500.00 (R. 14)	48,500.00
No. 155	52,000.00 (R. 85)	15,280.00 (R. 78)	36,720.00

[3] In No. 155 petitioner first sought to have the condemnation proceeding dismissed (R. 95), but after the decision of this Court in the *Muschany* case, *supra*, it amended its answer and sought judgment in the amount of the contract price (R. 98–100).

(No. 151, R. 26). The others did not ask for interest at that time.

No further proceedings were had in these cases pending the litigation of the validity of the contracts in the *Muschany* case. When this Court held that the contracts were valid and binding upon the United States (*Muschany* v. *United States,* 324 U. S. 49), the United States moved in these proceedings for judgments fixing the owners' compensation for the takings in the amounts named in the contracts without interest (R. 30, 95, 154, 243; No. 151, R. 27–28) and paid into court the difference between the estimated compensation deposited when the declarations of taking were filed and the price agreed upon in the contracts (R. 34; No. 151, R. 52). Petitioners answered the Government's motions and again moved for judgments in the amount of the contract prices, four of them asking for interest at 6% on the contract prices from the date possession was alleged to have been taken to the making of the deposits with the declarations of taking and interest at 6% on the difference between the contract prices and the deposits from the date of the deposits until paid (R. 32, 100, 156; No. 151, R. 29). Petitioner in No. 150 asked for interest at 6% on the difference between the contract price and the deposit from the date of the filing of the declaration of taking until paid (R. 245).

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The Weldon Spring condemnation cases were divided among three district judges. Motions and countermotions for judgments similar to those filed in these proceedings were filed in the others and the question of the allowance of interest on the contract prices was submitted to the three judges sitting together on April 4, 1945 (R. 37; No. 151, R. 31–46). Each of the judges ruled individually on the cases pending before him. Judge Hulen wrote an opinion concluding that interest should not be allowed on the amount of the contract price (60 F. Supp. 741) and entered judgment accordingly (No. 151, R. 47–52). Upon appeal by one of the landowners, petitioner in No. 151, the circuit court of appeals affirmed (No. 151, R. 77–85). Judge Moore, whose cases included Nos. 149 and 150, wrote an opinion concluding that interest was recoverable on the difference between the contract price and the estimated compensation deposited with the declaration of taking from the date of the filing of the declaration of taking to the date of payment of the difference into court (R. 162). 61 F. Supp. 199. Judge Duncan, whose cases included Nos. 148 and 155, concurred in Judge Moore's opinion (R. 36). The United States appealed from four of the judgments entered in cases pending before Judges Moore and Duncan (R. 1, 55, 123, 197). The circuit court of appeals, stating that the cases were identical with No. 151 so far as any material

facts were concerned, reversed on the authority of its decision in No. 151 with directions to the district court to enter judgment for the consideration stipulated in the contracts without interest (R. 294, 303–306).

ARGUMENT

1. It is not disputed that the "just compensation" guaranteed by the Fifth Amendment to the Constitution includes not only the value which the property had at the date of taking but also, where the taking precedes payment, "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; see also *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496. Nor is it disputed that interest on the value of the property from the date of taking until payment is a "good measure" of the amount to be so added. *Seaboard Air Line Ry.* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Jacobs* v. *United States*, 290 U. S. 13, 17; *United States* v. *Klamath Indians*, 304 U. S. 119, 123; cf. *Shoshone Tribe* v. *United States, supra.*

On the other hand, in the absence of a provision in the contract or a statute specifically subjecting the Government to the liability, interest does not run upon contractual claims against the Government even though there has been default in the payment of the principal. *Smyth* v. *United*

States, 302 U. S. 329, 353; *Boston Sand Co.* v. *United States,* 278 U. S. 41, 47; *United States* v. *North American Co.,* 253 U. S. 330, 336; *United States* v. *North Carolina,* 136 U. S. 211, 216; *Angarica* v. *Bayard,* 127 U. S. 251, 260; *Harvey* v. *United States,* 113 U. S. 243, 248–249.

In the instant cases the amount of the judgments has been fixed in the sums agreed upon in contracts between the Government and the owners and "just compensation" has never been determined. When the United States attempted to repudiate the contracts and instituted condemnation proceedings, the landowners objected to the Government's request for appointment of commissioners and, insisting upon the validity of the contracts, requested the court to fix the award of the sums stipulated in the contracts (R. 21–29, 84–95, 98–100, 143–153, 228–242; No. 151, R. 17–26). The sums thus agreed to may or may not represent "just compensation" within the meaning of the Constitution. The criterion for determining just compensation is the "fair market value" of the property. *United States* v. *Petty Motor Co.,* Oct. Term 1945, Nos. 77–83; *United States* v. *Miller,* 317 U. S. 369, 373–374. Here the contract prices do not represent solely an estimated value for the lands, but include such items as commissions to McDowell, the Government's agent to secure the options, and the cost of procuring title certificates. *Muschany* v. *United*

States, 324 U. S. 49, 56. Moreover, it has been the position of the Government that because of overvaluation or because of the inclusion of noncompensable items the contract prices in the Weldon Spring project were greatly in excess of fair market value. See *United States* v. *Muschany*, 139 F. 2d 661, 665–666 (C. C. A. 8). But as this Court pointed out in *Muschany* v. *United States*, 324 U. S. 49, 54–55, there was "no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price."

Thus, in these cases the liability of the United States has been determined, not under the Fifth Amendment, but under the contracts. Petitioners asserted the right to recover the contract prices and this Court sustained that claim in the *Muschany* case, *supra*. Petitioners now assert the right to receive just compensation.[4] These rights are inconsistent. *United States* v. *3.25 Acres of Land, Etc., in Seneca County*, 53 F. Supp. 884, 885–886 (W. D. N. Y.). For example, under a contract both the Government and the landowner are bound by the agreed amount even though it could be shown that "just compensation" was smaller or larger than the agreed amount. Unreasonable delay on the part of the

[4] No. 148, Pet. 7, 15, 17; No. 149, Pet. 13, 32–40; No. 150, Pet. 9–12, 21–25; No. 151, Pet. 7, 15, 17; No. 155, Pet. 13–14, 21, 26, 28–29.

United States in paying the agreed purchase prices might have justified the owners in terminating the contracts at any time during the Government's attempts to repudiate them. *United States* v. *Stott,* 140 F. 2d 941 (C. C. A. 8). In such case they would have been entitled to interest on the value of the property as part of just compensation from the date of taking to the date of payment, but the sum on which it would have been allowed would have been determined in accordance with the usual concept of just compensation.

Since petitioners insisted upon recovering their contract prices rather than just compensation, the court below correctly held that the allowance of interest in these cases would violate the rule that interest does not run on contractual claims against the Government even though there has been default in the payment of the principal (R. 303).

2. Contrary to petitioners' contention,[5] there is no conflict with this Court's decision in *Danforth* v. *United States,* 308 U. S. 271. In that case, this Court merely held that interest as part of just compensation is not allowed until there has been a taking and since there had as yet been no taking in that case, the owner was not entitled to recover interest on the award. Moreover, the agreement in that case

[5] No. 148, Pet. 12–13; No. 149, Pet. 3, 12–13; No. 150, Pet. 11; No. 151, Pet. 12–13; cf. No. 155, Pet. 21–22.

did not contemplate or provide for the taking of possession prior to payment of the award, whereas in the present cases the contracts gave the United States the right to possession and use of the property prior to payment and this right had been exercised.

Even the two district judges who held that petitioners were entitled to interest conceded that no interest would have been due if the United States had performed its part of the contract (R. 169, 256). But the failure of the United States to deposit the agreed compensation in court upon instituting the condemnation proceedings as provided in the contract does not permit the contract to be rewritten (cf. 60 F. Supp. 741, 745) or permit the owner to recover interest in violation of the rule (*supra*, pp. 9–10) that interest does not run on claims against the Government even though there has been default in the payment of the principal.

The circuit court of appeals stated (R. 302) that "by their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract." Contrary to petitioners' assertions[6] there is nothing in this

[6] No. 148, Pet. 12–13; No. 149, Pet. 3, 24–31; No. 150, Pet. 28–29; No. 151, Pet. 12–13; cf. No. 155, Pet. 24.

statement which conflicts with this Court's ruling in *Danforth* v. *United States*, 308 U. S. at 282–283, that the "effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title." The court below did not, as petitioners seem to assume, hold that the condemnation proceeding was converted to an action on a contract. If, as petitioners insist, the contracts are to be given effect on the amount of compensation awarded in the condemnation proceedings, they are controlling in their entirety. The landowners cannot insist upon the agreed prices insofar as they are favorable to them while at the same time rejecting them insofar as they are unfavorable.

3. Petitioners also contend that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Baugh*, 149 F. 2d 190.[7] Their position is that the court below erred in not construing their contracts the same way the stipulations in the *Baugh* case were construed.[8] In that case, the United States instituted condemnation proceedings and took possession of the lands to be acquired under Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199,

[7] No. 148, Pet. 7, 17–18; No. 149, Pet. 12; No. 150, Pet. 11, No. 151, Pet. 7, 17–18; No. 155, Pet. 14–15, 24–25.

[8] No. 148, Pet. 11–12, 13–14; No. 149, Pet. 19–24; No. 150, Pet. 25–28; No. 151, Pet. 11–12, 13–14.

sec. 201, 50 U. S. C. App., Supp. IV, sec. 632. Several months later the owners entered into stipulations agreeing to certain sums as just compensation and authorizing the entry of judgment in those amounts. The stipulations stated that they were made to expedite the vesting of title in the United States and the payment of just compensation to the owners without further proceedings, but the United States did not deposit the agreed amounts in court until seven or eight months later. The court interpreted the stipulations as fixing only the value of the land and as not constituting a waiver of the right to interest to which the owners would otherwise have been entitled, stating (149 F. 2d at 193): "In view of the several express waivers made in the writing it will not be presumed to have contained any implied waivers of substantial constitutional rights." Thus, the court below was correct in saying that that case may be distinguished from the present cases in which the contracts entered into prior to the condemnation proceeding expressly gave the United States the right of possession before payment of compensation. Moreover, whether or not the Fifth Circuit was correct in its construction of the stipulations in the *Baugh* case, the decision does not present a conflict with the present cases in which the court below was construing different contracts under different circumstances.

4. Upon instituting the condemnation proceedings, the United States filed a declaration of taking and deposited estimated compensation in court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e (R. 15, 74, 137, 216; No. 151, R. 10). Petitioners contend that they are entitled to interest by virtue of that Act.[9]

The Declaration of Taking Act (*infra*, p. 20) provides that upon the filing of a declaration of taking and the deposit of estimated compensation in court title to the property shall vest in the United States and:

> * * * the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

Thus, it will be observed that the Declaration of Taking Act is not a statutory exception to the rule that interest cannot be recovered against the

[9] No. 148, Pet. 15–16; No. 149, Pet. 14, 40–48; No. 150, Pet. 9–10, 16, 18, 21–25; No. 151, Pet. 15–16; No. 155, Pet. 13–14, 21–22.

United States, but merely an adoption in statutory form of the rule long recognized by the courts in allowing interest *as part of just compensation* where the Government has taken possession of the property in advance of payment of the full amount of the award. A uniform rate of interest was established as the "good measure" of the sum to be added to the value of the property to produce the full equivalent of value "paid contemporaneously with the taking," whereas previously the rate had varied in different states according to the legal rates of interest. Moreover, the Declaration of Taking Act does not preclude the parties from fixing the amount of compensation either before or after the institution of the condemnation proceeding. As has been pointed out, petitioners have elected to stand on the contracts and have opposed having "just compensation" ascertained in the condemnation proceeding as contemplated by the Act. The very terms of the Act defeat petitioners' contention because rather than providing for interest upon any agreed price it specifies that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest * * *."

CONCLUSION

The decisions below are correct; there is no conflict; and the cases do not present any important

question of federal law requiring further review by this Court. The petitions for writs of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1946.

APPENDIX

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e, reads as follows:

> [SEC. 1] * * * in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—
>
> (1) A statement of the authority under which and the public use for which said lands are taken.
>
> (2) A description of the lands taken sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said lands taken for said public use.
>
> (4) A plan showing the lands taken.
>
> (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation

stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders

in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the Chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstand-

ing the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

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Nos. 148, 149, 150, 151 and 155

In the Supreme Court of the United States

OCTOBER TERM, 1946

EDGAR S. ALBRECHT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EDWARD J. LINNENBRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

DENNIS B. PITMAN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

A. RAY OLIVER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

Q. W. S. S. REALTY AND INVESTMENT COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 148

EDGAR S. ALBRECHT ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 149

EDWARD J. LINNENBRINGER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 150

DENNIS B. PITMAN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 151.

A. RAY OLIVER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 155

Q. W. S. S. Realty and Investment Company, a Corporation, petitioner

v.

United States of America

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court in No. 151 is reported at 60 F. Supp. 741.[1] The opinion of the district court in Nos. 149 and 150 (R. 162–180, 249–267) is reported at 61 F. Supp. 199.[2] The unreported opinion of the district court in Nos. 148 and 155 is found at R. 36–37, 103–104. The opinion of the circuit court of appeals in *Oliver* v. *United States,* No. 151 (No. 151, R. 77–84) is reported at 155 F. 2d 73, and in *United States* v. *Albrecht, et al.,* Nos. 148–150 and 155 (R. 295–296) at 155 F. 2d 77.

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[1] This opinion is not in the Record, but mimeographed copies have been filed with the Clerk of this Court.

[2] The records in Nos. 148–150 and 155 were consolidated and will be referred to as "R." without further identification. The record in No. 151 will be referred to as "No. 151, R."

JURISDICTION

The judgments of the circuit court of appeals were entered on April 9, 1946 (R. 303–306; No. 151, R. 85). Petitions for rehearing were denied on April 30, 1946 (R. 321, 329, 341, 349; No. 151, R. 99). The petitions for writs of certiorari were filed on June 7 and 8, 1946, and were granted on October 14, 1946 (R. 356–357; No. 151, R. 105). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is obligated to pay interest upon an award in condemnation proceedings where no determination of just compensation is made but where the award, at the insistence of the landowner, is fixed in the amount agreed upon in a contract which gave the United States the right of possession prior to payment and made no provision for interest.

STATUTES INVOLVED

The pertinent provisions of the Act of July 2, 1917, 40 Stat. 241, c. 35, as amended by the Act of April 11, 1918, 40 Stat. 518, c. 51, 50 U. S. C. 171 and the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, secs. 1–5, 40 U. S. C. 258a–258e, are set out in Appendix, *infra*, pp. 43–47.

STATEMENT

These cases arise out of a large number of proceedings brought by the United States to condemn the fee simple title to certain lands in St. Charles County, Missouri, for the Weldon Spring Ordnance Plant (see R. 297, 295–296). The efforts of the War Department to acquire the land for the ordnance plant, its acceptance of approximately 270 contracts for the purchase of the land needed, and its subsequent unsuccessful attempt to repudiate all the contracts which had not been fully executed upon concluding that the contracts were invalid are detailed in the opinions in *United States* v. *Certain Land Situate in St. Chas. Co.*, 46 F. Supp. 921 (E. D. Mo.), reversed *sub nom. United States* v. *Muschany*, 139 F. 2d 661 (C. C. A. 8), reversed *sub nom. Muschany* v. *United States*, 324 U. S. 49. In the latter case, this Court upheld the validity of the contracts. The cases at bar involve several of the contracts which in their material portions are identical with those involved in the *Muschany* case, *supra*.

About six months prior to the institution of the various condemnation proceedings, the petitioners granted to the United States options to purchase their lands at fixed prices (R. 27–29, 85–93, 149–151, 237–242; No. 151, R. 36–38). These offers were duly accepted on behalf of the United States (R. 29, 93, 151, 242; No. 151, R. 38). The contracts thus executed granted to the Government

the right of immediate occupancy and use of the lands for any purpose whatsoever from and after the acceptance of the options until such time as the lands should be conveyed to the Government, the titles approved by the Attorney General of the United States, and the agreed purchase prices paid (R. 28, 92, 150, 241; No. 151, R. 37). The contracts provided that the landowners would convey titles free of all liens and encumbrances and, if necessary, make the titles merchantable, and that the purchase prices would be paid when certificates showing the titles to be vested in the United States should be furnished (R. 28, 92, 150, 241; No. 151, R. 37). The contracts further provided that (R. 29, 92–93, 151, 242; No. 151, R. 37–38).

> If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.
>
> The occupancy and use of the land by the Government as granted aforesaid shall not

be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

The United States took possession under the contracts (R. 23, 93, 151, 230; No. 151, R. 17–20, 26). Thereafter it sought to repudiate the contracts and to acquire the lands by condemnation proceedings which were instituted under the Act of July 2, 1917, 40 Stat. 241, c. 35, as amended by the Act of April 11, 1918, 40 Stat. 518, c. 51, 50 U. S. C. 171, by the filing of petitions requesting that commissioners be appointed to determine, assess and award compensation (R. 9, 63, 129, 204; No. 151, R. 4). Declarations of taking were filed with the petitions pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, c. 307, sec. 1, 40 U. S. C. 258a, and estimated compensation in amounts substantially less than the contract prices was deposited in court (R. 15, 74, 137, 216; No. 151, R. 10).[3] Judgments were entered on the declarations of taking stating that title in fee simple absolute to each of the tracts had vested in the United States and ordering possession to be immediately surrendered to the United States (R. 18, 79, 140, 221; No. 151, R. 15).

In No. 148, the owners Edgar E. Albrecht and Geraldine Albrecht filed an answer to the petition

[3] The estimated compensation for 109 tracts was $920,085.35 less than the contract prices (R. 101–102).

denying that they, at the time the condemnation proceedings were instituted, had either title or possession of the property (R. 21). They alleged that they had, long prior to the institution of the proceedings, surrendered possession to the United States pursuant to the option contract between them and the Government; that they had fully performed all obligations of the contract by delivering a warranty deed dated February 6, 1941 to the Kansas City Title Company, authorized to act for the United States in that connection, and by procuring the required title certificates; and that the United States had delivered a check payable to them to the Title Company for transmission to them, but had withdrawn it before delivery and had never paid the purchase price (R. 21-23). They further alleged that, they having performed their part of the contract and the United States having taken and retained possession, the United States was estopped to abrogate its obligations under the contract or to proceed in the condemnation proceedings contrary to its duties and obligations under the contract, but was bound to carry on the proceedings in conformity with the provisions of the contract which were expressly applicable thereto (R. 23-24). They also asserted that if the Attorney General had approved the title there would be nothing to condemn, the cause would be moot and the court would have no jurisdiction because the United States was

the owner in possession of the property (R. 24). They prayed that the court enter its verdict, judgment and decree fixing the award for the land at $21,425, the agreed purchase price, and requiring the United States to deposit that sum in court to be disbursed pursuant to decree (R. 24). Albert W. Albrecht, Jr. and Virginia Albrecht, owners of an interest in the same tract and parties to the same option contract, answered separately, making similar allegations and closing with the same prayer (R. 25-29). No interest was sought at that time.

In No. 149, Edward J. Linnenbringer and Emma Linnenbringer answered, alleging the execution of the option contract with the Government on December 6, 1940, the delivery of a warranty deed which was accepted and recorded by the United States, and the taking of possession by the United States (R. 143–152). They denied the power and authority of the United States to acquire their property except pursuant to the contract and asserted that the court had no authority to appoint commissioners or take any other or further steps in the condemnation proceeding except to enter judgment awarding them the sum provided in the contract (R. 145, 151–152). Alleging that they had performed their part of the contract and that the United States had failed and refused to pay the consideration agreed upon, the Linnenbringers prayed that

judgment be entered for $34,000, the amount of the contract price, with interest at 6% from January 13, 1941, the date it was alleged that the deed was delivered and the United States took possession (R. 151–153).

In No. 150, the Pitmans filed an answer containing substantially the same allegations as the answer filed by the Linnenbringers in No. 149 and prayed that the court enter judgment fixing the award at the agreed price of $35,000 with interest at 6% from January 15, 1941, the date possession was taken, and ordering that sum to be deposited in court and distributed pursuant to the terms of the contract and judgment (R. 228–237).

In No. 151, the Olivers answered the petition for condemnation, denying that at the time of the institution of the condemnation proceedings they had either title or possession of the property and asserting that they had, long prior to the institution of the proceedings, surrendered possession to the United States pursuant to the option contract between them and the Government (R. 17–20, 25–26). They denied the authority of the United States to acquire the property in any other way than that designated in the contract and asserted that if the Attorney General had approved the title, there would be nothing to condemn, the cause would be moot and the court would have no jurisdiction to proceed since the United States was the owner in possession

(R. 18, 25–26). They further alleged that the United States was estopped to proceed contrary to its obligations under the contract and prayed for judgment in the amount of the contract price of $70,000 with interest at 6% from the date of the acceptance of the option by the United States and they sought a decree requiring the Government to deposit that sum with interest in court (R. 26).

In No. 155, the Q. W. S. S. Realty and Investment Company filed an answer alleging that the United States and the Company had entered into a valid contract for the sale of the land described in the petition for $52,000, that under the contract the Company had granted and the United States had taken and retained possession, and that pursuant to the contract, the Company had furnished a title certificate and delivered a warranty deed to the United States through its duly authorized agent and was willing to record the deed and furnish the final title certificate referred to in the contract (R. 85, 93). The Company alleged that the United States by taking title and possession was estopped to deny the validity of the contract or to condemn the land except for the contingency named in the contract, i. e., the non-approval by the Attorney General of the title, a contingency upon which the condemnation proceeding was not predicated. The Company further alleged that the condemnation proceeding

was unnecessary, illegal and void, because fee simple title was already vested in the United States and the United States was in possession (R. 94). It was prayed that the Court vacate and set aside the order and judgment on the Declaration of Taking, deny the petition for condemnation and discharge the Company with its costs (R. 95).

No further proceedings were had in these cases pending the litigation of the validity of the contracts in the *Muschany* case. When this Court held that the contracts were valid and binding upon the United States (*Muschany* v. *United States*, 324 U. S. 49), the Government moved in these proceedings for judgments fixing the owners' compensation for the takings in the amounts named in the contracts without interest (R. 30, 95, 154, 243; No. 151, R. 27–28) and paid into court the difference between the estimated compensation deposited when the declarations of taking were filed and the price agreed upon in the contracts (R. 34; No. 151, R. 52). Petitioners answered the Government's motions and again moved for judgments in the amount of the contract prices, four of them asking for interest at 6% on the contract prices from the date possession was alleged to have been taken to the making of the deposits with the declarations of taking and interest at 6% on the difference between the contract prices and the deposits from the date of the deposits until paid

(R. 32, 100, 156; No. 151, R. 29).[4] Petitioner in No. 150 did not ask for interest from the date possession was alleged to have been taken but only for interest at 6% on the difference between the contract price and the deposit from the date of the filing of the declaration of taking (R. 245).

The Weldon Spring condemnation cases were divided among three district judges. Motions and countermotions for judgments similar to those filed in these proceedings were filed in the others and the question of the allowance of interest on the contract prices was submitted to the three judges sitting together on April 4, 1945 (R. 37; No. 151, R. 31–46). Each of the judges ruled individually on the cases pending before him. Judge Hulen wrote an opinion concluding that interest should not be allowed on the amount of the contract price (60 F. Supp. 741) and entered judgment accordingly (No. 151, R. 47–52). Upon appeal by one of the landowners, petitioner in No. 151, the circuit court of appeals affirmed (No. 151, R. 77–85). Judge Moore, whose cases included Nos. 149 and 150, wrote an opinion concluding that interest was recoverable on the difference between the contract price and the estimated compensation deposited with the declaration of taking from the date of the filing of the declaration of

[4] Petitioner in No. 155 had previously sought to have the condemnation proceeding dismissed (see *supra* p. 10), but after this Court's decision in the *Muschany* case, *supra*, it amended its answer and sought judgment in the amount of the contract price (R. 98–100).

taking to the date of payment of the difference into court (R. 162; 61 F. Supp. 199). Judge Duncan, whose cases included Nos. 148 and 155, concurred in Judge Moore's opinion (R. 36). The United States appealed from four of the judgments entered in cases pending before Judges Moore and Duncan (R. 1, 55, 123, 197). The circuit court of appeals, stating that the cases were identical with No. 151 so far as any material facts were concerned, reversed on the authority of its decision in No. 151 with directions to the district court to enter judgment for the consideration stipulated in the contracts without interest (R. 294, 303–306).

The circuit court of appeals concluded that since the United States acquired the right to possession under the contracts, which neither provided for interest nor specified a time for payment, the settled rule denying the recovery of interest for delay by the United States in performing its contractual obligations precluded the payment of interest in these cases. It held that the constitutional and statutory provisions to the effect that just compensation includes compensation for delay in payment after there has been a taking of property were inapplicable since the instant cases were controlled as to the amount of recovery by the terms of the contracts (R. 302–303).[5]

[5] The remaining cases are being held in abeyance pending final decision in these test cases. In the *Muschany* and

SUMMARY OF ARGUMENT

I

The amount of compensation to be paid for the property condemned in these proceedings was fixed in accordance with the sums agreed upon in contracts entered into prior to the institution of the proceedings. The contracts gave the United States the right to possession of the property prior to payment of the agreed prices, but made no provision for the payment of interest. Consequently, interest cannot be recovered on the contract prices because, unless specifically agreed upon by contract or imposed by legislation, interest cannot be recovered on contractual claims against the Government even though there has been default in the payment of the principal.

II

Interest is allowed under the Fifth Amendment when property is taken for public use prior to payment only as part of "just compensation." It is allowed not as an "exception" to the rule that interest does not run on claims against the United States, but as a "good measure" of the sum necessary to produce the full equivalent of

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Andrews cases, the test cases as to validity of the contracts, the court below took the same position as to interest liability but denied the Government's application to be relieved of such liability on procedural grounds. *United States* v. *Muschany*, 156 F. 2d 196 (C. C. A. 8).

the value of the property paid contemporaneously with the taking. When the owner of property taken agrees in writing to the sum to be paid, the amount of compensation rests upon express contract and is binding on the parties to the contract whether or not the agreed sum represents "just compensation" within the meaning of the Constitution. "Just compensation" has never been determined in the cases at hand. *Muschany* v. *United States,* 324 U. S. 49, 54–55. The owners could have acquiesced in the Government's attempt to have just compensation ascertained. In that event they would have been entitled to interest as part of just compensation. Instead, they insisted upon recovering their contract prices. Having done so, they may not reject the contracts insofar as they are unfavorable and rely upon the constitutional guarantee of just compensation to obtain what their contracts deny them. The case of *Danforth* v. *United States,* 308 U. S. 271, is not to the contrary since, in that case, the contracts did not contemplate, or provide for, possession prior to payment of the award. This Court merely held that interest would not run until a taking had occurred. Here the contracts gave the United States the right to possession and that right had been exercised. The case of *United States* v. *Baugh,* 149 F. 2d 190 (C. C. A. 5) is not sound and, in any event, is distinguishable on the ground that it was based upon the

construction of a stipulation, the contents of which differ from the contracts involved here and which was entered into under different circumstances.

III

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e is not a statutory exception to the rule denying interest against the sovereign, but permits interest only as "part of the just compensation." By the terms of the Act, interest is to be paid on compensation ascertained and awarded in the condemnation proceeding. Here, compensation was fixed by an agreement entered into prior to the condemnation proceding and just compensation was not determined. Consequently, interest cannot be recovered under that Act.

ARGUMENT

I

PETITIONERS WERE NOT, UNDER THEIR CONTRACTS, ENTITLED TO RECOVER INTEREST UPON THE PRICES FIXED IN THE CONTRACTS

It is well established that in the absence of a provision in the contract or a statute specifically subjecting the Government to the liability, interest does not run on contractual claims against the Government even though there has been default in the payment of the principal. *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *Goltra*,

312 U. S. 203, 207; *Boston Sand Co.* v. *United States,* 278 U. S. 41, 47; *United States* v. *North American Co.,* 253 U. S. 330, 336; *United States* v. *North Carolina,* 136 U. S. 211, 216; *Angarica* v. *Bayard,* 127 U. S. 251, 260; *Harvey* v. *United States,* 113 U. S. 243, 248–249.

The landowners in these cases entered into contracts to sell their properties to the United States at agreed prices. The contracts granted to the United States the right of immediate possession of the lands.[6] The contracts contemplated that they would be carried out in one of two ways, either by the execution of a warranty deed by the owner or by the institution of condemnation proceedings by the United States.[7] In the

[6] The contracts provided as follows (R. 28, 92, 150, 241; No. 151, R. 37):

> The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

[7] The contracts provided (R. 29, 92–93, 151, 242; No. 151, R. 37–38):

> If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance

latter event, the right of occupancy and use was to continue uninterrupted during the pendency of the condemnation proceedings.[8] But even though the United States was given the right of possession as soon as the contracts were accepted by it, immediate payment was not contemplated since the agreed prices were not to be paid until the deeds were executed and certificates showing title to be vested in the United States were furnished or condemnation proceedings were instituted as provided for in the contracts (R. 28–29, 92–93, 150–151, 241–242; No. 151, R. 37). No time was fixed within which the agreed prices should be paid or condemnation proceedings instituted. In view of the many parcels involved it was obvious that payment would be delayed while title certificates were being secured and the titles examined by the Government. And, as the court said in *Coggeshall* v. *United States*, 95 F. 2d 986, 989, 990 (C. C. A. 4): "The statutory safeguards that have wisely been thrown around the expendi-

with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

[8] The provision of the contracts was as follows (R. 29, 93, 151, 242; No. 151, R. 38):

> The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

ture of public funds are such as cause unavoidable delay in the making of such disbursements." Again in *Wachovia Bank & Trust Co.* v. *United States*, 98 F. 2d 609, 611 (C. C. A. 4) the court said: "Action on the part of the Government officials in matters of this kind is necessarily somewhat slow. *Coggeshall* v. *United States, et al.*, 4 Cir., 95 F. 2d 986. The respondents knew these facts and entered into the option with the full knowledge of them and, as there was no unnecessary delay, are bound." Moreover, the provision of petitioners' contracts that the agreed purchase price should be deposited in court when condemnation proceedings were instituted did not guarantee immediate payment thereof to petitioners because it was unlikely that the court would have dispersed such funds to petitioners while a title dispute remained unsettled. Cf. *United States* v. *Certain Parcels of Land*, 40 F. Supp. 436 (D. Md.). All of these factors show that considerable delay in payment was inevitable, and must have been contemplated by all parties. Nevertheless, no provision was made for interest or for computation of compensation in some other manner for the use of the property between the time possession was taken and payment was made. Since the parties are presumed to know the well settled rule that interest is not payable on contracts with the United States unless specifically provided for, it is plain that they did not intend that interest should be paid. And, in any event,

under that rule, petitioners are not entitled to interest since the contracts did not specifically provide for it.

All of the courts below which have passed on this question have agreed that interest could not be recovered under the contracts. Judge Moore, who held that petitioners were entitled to interest for other reasons, stated (R. 169) that "Had the contracts been performed in the manner contemplated on their face they would have needed no interest and been entitled to none." Petitioners' contentions rest, as did the decisions of two of the district courts (R. 169, see R. 37), upon the fact that the Government breached one of the terms of the contract by delaying the deposit in court of the entire agreed purchase prices until after this Court had sustained the validity of the contracts. We submit that this delay in making payment cannot warrant the imposition of interest liability on the United States. As was held in *United States* v. *Stott*, 140 F. 2d 941 (C. C. A. 8), an unreasonable delay in paying the agreed price might have justified termination of the contracts. But as all of their pleadings show—both their answers originally filed and their amendments and motions filed after this Court's decision in the *Muschany* case, *supra*, pp. 8–12, the landowners, far from electing to rescind the contracts, have insisted upon their performance. Having insisted upon performance, they cannot also recover interest.

The argument that the Government's delay in depositing the agreed price entitles petitioners to interest is in direct conflict with the rule (*supra*, pp. 16–17) that "interest does not run upon claims against the Government even though there has been default in the payment of the principal." *Smyth* v. *United States*, 302 U. S. 329, 353. As the court said in *United States* v. *3.25 Acres of Land, Etc., in Seneca County*, 53 F. Supp. 884, 886 (W. D. N. Y.) in applying this rule in a condemnation proceeding in which the owners had agreed with the United States upon the amount of compensation:

> * * * The amount agreed upon was $17,000, not $17,000 plus interest from the date of the taking. Nor may the Government be penalized for the delay in payment, even if responsible for it. "Interest, when not stipulated for by contract or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. * * *" *United States* v. *North Carolina*, 136 U. S. 211, 216, 10 S. Ct. 920, 922, 34 L. Ed. 336.

Thus, whatever the cause of the delay, the Government is not obligated to pay interest for the delay in payment of principal. It should be noted, however, that all of the courts below, even those which held the Government liable for interest, recognized that the four year delay in payment was not due to bad faith or unreasonableness on the part of the Government but simply to the necessary delay incident to a final settlement of the question whether the contracts were valid. As Judge Moore stated (R. 179): "Great skill and diligence has been exercised by those [the Government's] agents, and the Court believes that their efforts were certainly not unreasonable in the light of the contrary opinions arrived at by the various jurists to whom the issues have so far been presented."

II

THE OBLIGATION OF THE UNITED STATES TO PAY INTEREST AS PART OF "JUST COMPENSATION" UNDER THE FIFTH AMENDMENT WHEN PROPERTY IS TAKEN IN EXERCISE OF THE POWER OF EMINENT DOMAIN IS NOT APPLICABLE HERE

The United States, when it instituted these proceedings, sought to repudiate the contracts and have just compensation determined in accordance with the requirements of the Fifth Amendment to the Constitution. The landowners resisted, insisting that the Government was obliged to pay the contract prices (R. 21–29, 84–95, 143–153, 228–242;

No. 151, R. 17–26). The landowners' contentions were eventually sustained and the Government held liable for the contract prices and those amounts have been paid. Nevertheless petitioners, relying upon the fact that these cases are condemnation proceedings, seek to invoke the guaranties of the Fifth Amendment solely for the purpose of recovering interest. But this position ignores the fact that "just compensation" as provided for in the Fifth Amendment has never been determined. Rather, as the court below stated (R. 302) these proceedings have been controlled, as to the amount of recovery, by the terms of the purchase contracts under which no interest is payable. Certainly petitioners "are not entitled to insist upon provisions of the contract favorable to them while rejecting others which are unfavorable" (R. 302). Under the circumstances of these cases, petitioners were presented a choice between two courses of action—the first, to insist upon receiving the prices fixed in the contracts—the second, to acquiesce in the Government's attempted repudiation of the contracts and thereby to receive the "just compensation" guaranteed by the Constitution. It is plain that petitioners could not do both, since the two possibilities were inconsistent and mutually exclusive alternatives.

The "just compensation" guaranteed by the Fifth Amendment has a clearly defined meaning when applied in condemnation proceedings. First, the criterion for determining just compensation is

the "fair market value" of the property taken. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; *United States* v. *Miller*, 317 U. S. 369, 373–374. Second, where the taking precedes payment, "just compensation" is comprehensive, embracing not only the value of the property at the date of the taking, but also "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306. Or as was stated in *Shoshone Tribe* v. *United States*, 299 U. S. 476, at page 496:

> * * * The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.

Interest is merely a "good measure" by which to ascertain one element of the just compensation required by the Fifth Amendment. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Jacobs* v. *United States*, 290 U. S. 13, 17; cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496. As this Court said in *United States* v. *Klamath Indians*, 304 U. S. 119, 123:

> Nor is it quite accurate to say that interest as such is added to value at the time of the

> taking in order to arrive at just compensation subsequently ascertained and paid. The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. *Jacobs* v. *United States*, 290 U. S. 13, 16–17, and cases cited.

Contrary to the view of two of the trial courts (R. 164, 37), the "allowance of interest in eminent domain cases is only an *apparent* exception [to the rule forbidding interest], which has its origin in the Constitution." *Smyth* v. *United States*, 302 U. S. 329, 353 (italics supplied). Thus, when the United States deprives a landowner of his property by the exercise of the power of eminent domain and the parties do not agree as to value, the Constitution guarantees him the right to "just compensation". That includes compensation, usually measured by interest, for failure to make payment contemporaneously with the taking. No agreement to pay is necessary. But when the owner has voluntarily agreed in writing with the United States as to the value, the amount of compensation rests on express contract. The distinction was well stated in *United States* v. *3.25 Acres of Land, Etc., in Seneca County*, 53 F. Supp. 884 (W. D. N. Y.). The court said (pp. 885–886):

> * * * The right to just compensation for property taken and the right to an award for an amount expressly agreed upon are inconsistent rights. The former rests upon equitable principles and comprehends that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken. *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299, 304, 43 S. Ct. 354, 67 L. Ed. 664. The latter rests upon express agreement regardless of whether the owner's position pecuniarily is worse or better than if he had not parted with his property.

The contradiction between these two rights appears from the fact that when an express agreement is involved, the Government is bound to pay the agreed amount even though it might be able to show that the constitutional requirement of just compensation would be satisfied by a smaller sum. Cf. *Danforth* v. *United States,* 308 U. S. 271, 282–283. So also, the owner is bound by an agreement to convey the property to the United States for a price which might be less than the amount judicially determined to be just compensation. Cf. *United States* v. *Greer Drainage District,* 121 F. 2d 675 (C. C. A. 5). Nothing in the Fifth Amendment prohibits the parties from agreeing upon the amount to be paid or relieves them from the obligation of such a contract.

In the instant cases, "just compensation" has never been determined. The contract prices do

not represent solely an estimated value for the lands, but include such items as commissions to McDowell, the Government's agent, to secure the options and the cost of procuring title certificates. *Muschany* v. *United States*, 324 U. S. 49, 56. Moreover, it has been the position of the Government that because of over-valuation or because of the inclusion of non-compensable items, the contract prices in the Weldon Spring project were greatly in excess of fair market value.[9] See *United States* v. *Muschany*, 139 F. 2d 661, 665–666 (C. C. A. 8). But as this Court pointed out in *Muschany* v. *United States*, 324 U. S. 49, 54–55:

> The two cases were decided [in the trial courts] in favor of the validity of the contracts and the compensation was fixed at the price stated in the contract without revaluation. Consequently there was no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price. The Government makes no objection to this manner of determining compensation if the accepted options

[9] The Government's total estimate of just compensation for all of the tracts in which condemnation proceedings were filed and the validity of the contracts attacked was $920,085.35 less than the total contract prices for those tracts (see R. 101–103). This difference was due, not as petitioner Linnenbringer asserts (Pet. Br. No. 149, p. 29) simply to a mistake in estimating just compensation, but to the fact, as the Government contended, that the contract prices far exceeded just compensation.

(contracts) are valid. Compare *Danforth* v. *United States*, 308 U. S. 271, 282.

Thus, the majority of this Court has recognized that the agreed prices do not necessarily represent the just compensation guaranteed by the Constitution and, as Mr. Justice Black pointed out in the dissenting opinion at page 69, the amounts agreed upon, even in the absence of a finding of fraud, might "well be far in excess of what is 'just compensation.'"

Under the circumstances of these cases, the landowners as we have shown *supra*, p. 23, had an election to rely either upon the Constitutional guarantee of the Fifth Amendment or upon their contracts with the Government. They could have acquiesced in the Government's attempt to have just compensation determined or they might have taken steps to terminate the contracts at any time while the Government was trying to repudiate them. Cf. *United States* v. *Stott*, 140 F. 2d 941 (C. C. A. 8). If they had done so they would have been entitled to interest on the value of the property from the date of taking to the date of payment, but the sum on which it would have been allowed would have been determined in accordance with the usual concept of just compensation, i. e., market value fairly determined. Instead, they insisted upon recovering the contract prices. They cannot now invoke a portion of the Constitutional guarantee of just compensation to obtain interest while at the same time rejecting the

most important part—that just compensation is measured by market value fairly determined.

Petitioner Linnenbringer emphasizes[10] the fact that after this Court's decision in the *Muschany* case, the Government moved for entry of judgment in the amount of the contract prices without interest apparently as indicating that the awards were fixed in the amount of contract prices at the insistence of the Government. However, the other petitioners concede that it was at their insistence that the awards were so fixed (Pets. Br. 155, pp. 22, 25; Pets. Br. 151, p. 17). In their original answers all of the landowners insisted upon receiving the contract prices (see *supra*, pp. 6–11) and this position was maintained by Linnenbringer and the other landowners in their amendments and motions filed after the *Muschany* decision (see *supra*, pp. 11–12). As this Court noted (324 U. S. at p. 55), the Government recognized, in the *Muschany* case, that if the contracts were valid the landowners were entitled to have the awards fixed at the contract prices in the condemnation proceeding.[11] Thus, the Government, when it moved for entry of the awards in the contract amounts, was simply acting in accordance with this Court's decision in the *Muschany* case

[10] Pets. Br. No. 149, pp. 9, 27, 28, 32, 37, 49, 52.

[11] To deny the landowners a right to rely on their contracts in the condemnation proceedings would seem to lead to a multiplicity of suits because, in that event, the landowners could, in suits on the contracts, recover any deficiences of the awards below the contract prices.

and was notifying the many landowners of that fact.[12] These motions did not alter the fact, as stated by the court below (R. 302) that "By their successful defense of the validity of the purchase contract, the landowners converted the condemnation proceedings from an ordinary adversary proceeding into one controlled, as to the amount of their recovery, by the terms of the purchase contract."

Upon the decision of this Court in the *Mu[illegible]any* case that the contracts were valid, the Government might have dismissed the condemnation proceedings and settled the matter under the contracts on the ground that, as alleged by many of the landowners, there was nothing to condemn since they had conveyed a good title pursuant to the contracts (see *supra*, pp. 6–11).[13] It is clear that if

[12] Because of the many parties involved and the experience of Government attorneys in condemnation proceedings, the United States takes the leading part in presentation to the court of formal motions, judgments, etc., regardless of whether it agrees with the rulings upon which they are based. Cf. *United States* v. *111,000 Acres of Land in Polk and Highlands Counties*, 155 F. 2d 683 (C. C. A. 5).

[13] Under the declaration of taking procedure, the Government cannot abandon a proceeding after title has passed pursuant to a declaration of taking. *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (C. C. A. 7). It was the Government's position that since the contracts were invalid no title passed pursuant thereto; hence the declaration of taking would have vested title in the United States. However, the contracts having been held valid it would seem that, as some of the landowners alleged, their titles had passed under the deeds, in which case the declaration of taking did not pass

the Government had so proceeded there would be no basis for the present claim of petitioners for interest. It was much more reasonable, however, to settle the entire matter in the pending condemnation procedings and no one objected to such procedure. Cf. *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C. C. A. 1), certiorari denied October 14, 1946, No. 143, this Term. This was advantageous to the landowners since it avoided the necessity of bringing a new suit to settle the interest question. The fact that this procedure, of settling the entire matter in the condemnation case, was selected should not increase the Government's liability.

There is nothing in this Court's decision in *Danforth* v. *United States*, 308 U. S. 271, so vigorously invoked by petitioners,[14] to support the notion that they are entitled to rely upon the favorable portions of the contract while rejecting others which are unfavorable, nor does that decision tend to indicate any error in the holding of the court below (R. 301–302) that, if the contracts are to control the question of compensation, they must be

such title and the proceedings could, therefore, be abandoned at any time. See *O'Connor* v. *United States*, 155 F. 2d 425 (C. C. A. 9); *Moody* v. *Wickard*, 136 F. 2d 801 (App. D. C.), certiorari denied, 320 U. S. 775. This is not to say that the condemnation proceedings would not be an appropriate means of settling title disputes and acquiring any outstanding interests. See *United States* v. *Carmack*, this Term, No. 40.

[14] Pets. Br. No. 149, pp. 32–35, 50; Pets. Br. No. 151, pp. 15–17; Pets. Br. No. 155, pp. 17–18.

considered in their entirety. Factually, the *Danforth* case presented an entirely different situation from the instant cases and, indeed, the claim for interest was denied. The agreement in that case was not, as were petitioners' contracts, an agreement for sale of property at fixed prices, the Government being authorized to take possession immediately; rather it was simply a stipulation fixing the amount of the award if the Government should condemn a flowage easement. This Court merely held that as there had been no taking of such an easement, interest was not recoverable. Since the contracts in the *Danforth* case did not contemplate possession and use prior to payment, the price fixed could not have included consideration for such possession and use. On the contrary, here the contract price represented consideration both for the land and for its exclusive possession and use from the effective date of the contract until payment (R. 302; see *supra*, p. 19).[15] Finally, the holding of this Court in the *Danforth* case—that giving the contract effect in the condemnation pro-

[15] Petitioner in No. 155 (Q. W. S. S. Realty and Investment Company) argues that the consideration for possession of the property was not the sum designated in the option as the purchase price, but the $1.00 paid by the United States for the option prior to its acceptance by the Government (Pets. Br. No. 155, pp. 5, 11, 13–14, 20–22). This is clearly incorrect since the right of possession was not granted until the option was accepted by the United States (R. 92) and thereby converted into a bilateral contract, the consideration for which was the agreement by the United States to pay the sum designated as the purchase price.

ceedings does not convert that proceeding into a suit against the United States for enforcement of the contract (308 U. S. at 282–283)—does not mean that only portions of the contract are to be given effect or that the essential nature of petitioners' claims can be ignored.

Petitioners also rely upon *United States* v. *Baugh*, 149 F. 2d 190 (C. C. A. 5), contending that their contracts should be construed in the same way as the stipulations in the *Baugh* case.[16] In that case, on August 24, 1942, the United States instituted condemnation proceedings and took possession of the lands to be acquired under Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App. (Supp. V) 632. Several months later, in January and February 1943, the owners entered into stipulations agreeing to certain sums as just compensation and authorizing the entry of judgment in those amounts. The stipulations stated that they were made to expedite the vesting of title in the United States and the payment of just compensation to the owners without further proceedings. However, the United States did not deposit the agreed amounts in court until seven or eight months later in August, 1943, a delay which the court characterized as unreasonable. The court held that the landowners were entitled to interest

[16] Pets. Br. No. 149, pp. 40–46; Pets. Br. No. 151, pp. 21–22; Pets. Br. No. 155, p. 25.

from the date the stipulations were signed to the date of payment. The reasoning of the opinion is, we submit, unsound. As we have shown (*supra*, pp. 23–25) the term "just compensation" as used in the Fifth Amendment embraces not only fair market value of the property taken but an amount, usually measured by interest, to compensate for the delay between date of taking and date of payment. The court in the *Baugh* case recognized this principle and did not indicate that the parties used the term "just compensation" in a different sense in the stipulations. Nevertheless, it stated that the landowners were entitled to receive interest as well as just compensation. Certainly, if the term "just compensation" was used in the constitutional sense, it included interest as well as the other elements embraced in the constitutional guarantee, and the court was not warranted in imposing additional liability by way of interest on the Government.

In any event, as all the courts below have recognized (R. 303, 175, 36) the *Baugh* decision is not in point here. At the time the stipulations were executed there had already been a taking under the power of eminent domain and, rather than being contracts of purchase, the agreements simply settled the amount of compensation. The *Baugh* decision rested largely on the thought that the landowners expected that payment would be made promptly and there would be no indefinite

or unreasonable delay.[17] On the contrary, petitioners could not have expected payment immediately upon acceptance of their options (see *supra*, pp. 18–19). Moreover, petitioners simply executed a contract for the sale of land at a fixed price. The parties did not purport to be settling the amount of an existing obligation to pay just compensation, as in the *Bough* case. The instant cases do not present a situation of "implied waiver" of one of the elements included in just compensation (see e. g. Pets. Br. No. 149, p. 44). As we have shown (*supra*, p. 23) petitioners had a choice between two inconsistent rights. Having rested their claims upon the sale contracts, the rights which they might have had to claim just compensation became immaterial.

III

THE DECLARATION OF TAKING ACT DOES NOT GIVE PETITIONERS A RIGHT TO INTEREST

Upon instituting the condemnation proceedings, the United States filed a declaration of taking and deposited estimated compensation in court under the authority of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e (R. 15, 74, 137, 216; No. 151, R. 10). Petitioners, while recognizing that the Act simply restates the constitutional

[17] Although the stipulations were intended to expedite the disbursement of funds, no reason appeared why the payment was delayed for seven months.

requirement of just compensation, nevertheless contend that they are entitled to interest on the contract prices by virtue of that Act.[18] As we have shown (*supra*, pp. 22–35) petitioners are not entitled to recover interest on the contract prices under the "just compensation" clause of the Fifth Amendment. It is equally clear that the Declaration of Taking Act does not enlarge the obligations of the United States beyond that imposed by the Constitution so as to permit the recovery of interest by petitioners.

The Declaration of Taking Act (*infra*, pp. 47–47) provides that upon the filing of a declaration of taking and the deposit of estimated compensation in court title to the property shall vest in the United States and:

> * * * the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

[18] Pets. Br. No. 149, pp. 24–31; Pets. Br. No. 151, p. 13; Pets. Br. No. 155, p. 17.

Thus, it will be observed that the Declaration of Taking Act is not a statutory exception to the rule that interest cannot be recovered against the United States, but merely an adoption in statutory form of the rule long recognized by the courts in allowing interest as part of just compensation where the Government has taken possession of the property in advance of payment of the full amount of the award. A uniform rate of interest was established as the "good measure" of the sum to be added to the value of the property to produce the full equivalent of value "paid contemporaneously with the taking," whereas previously the rate had varied in different states according to the legal rates of interest. Moreover, the Declaration of Taking Act does not preclude the parties from fixing the amount of compensation either before or after the institution of the condemnation proceeding. As has been pointed out (*supra*, pp. 22–23), petitioners have elected to stand on the contracts and have opposed having "just compensation" ascertained in the condemnation proceeding as contemplated by the Act. The very terms of the Act defeat petitioner's contention because rather than providing for interest upon any agreed price it specifies that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest * * *."

Petitioners contend (Pets. Br. No. 151, pp. 25–26) that the fact that title vests in the United States upon the filing of a declaration of taking confers a benefit on the United States which estops it to deny the alleged statutory obligation to pay interest and it is asserted that petitioners were thereby placed at a disadvantage. But this ignores the fact that petitioners had already parted with their titles insofar as it was within their power to do so by entering into the contracts of sale and by the execution of deeds which they have never repudiated—a fact which petitioners not only recognized but vigorously asserted in answering the Government's petitions to condemn (See *supra*, pp. 6–11). The United States already had possession of the lands under the contract. The passage of technical legal title was neither a benefit to the United States nor a detriment to the owner such as would give rise to an estoppel. Furthermore, the alleged estoppel would not support petitioners' claims since, as we have already stated, interest is allowed under the Declaration of Taking Act merely as a part of just compensation, which has never been determined. Petitioners seek to avoid the effect of this fact by suggesting that the contracts simply fixed the value of the lands. But as we have shown the contract prices included the consideration for delay in payment while the Government was in possession rather

than the land value alone to which a jury verdict would have been limited.[19]

Petitioner Linnenbringer contends (1) that the jurisdiction of the court was invoked under the Declaration of Taking Act, and (2) that there was a "taking" under that Act and that, therefore, interest should be paid pursuant to that Act (Pets. Br. No. 149, pp. 24–39). But, in the first place, the jurisdiction of the court rested upon the Act of July 2, 1917, as amended, Appendix *infra*, p. 43, and the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257 (R. 10, 65, 131, 206; No. 151, R. 5). As this Court pointed out in *Catlin* v. *United States*, 324 U. S. 229, 240, the Declaration of Taking Act did not provide for a new condemnation proceeding. It simply afforded a process ancillary or incidental to suits brought under other statutes. Secondly, in the present cases, there was no "taking" when the declaration of taking was filed. This is so because, as we have shown (*supra*, pp. 17–18) possession was taken under the provisions of the contracts and not under the power of eminent domain. And in an event, under the eminent domain power, it is the physical taking of possession, not the later filing of a declaration of taking, which constitutes the "taking" for the

[19] In an ordinary condemnation proceeding the jury would simply find the fair market value of the land at the time of the taking. The interest would be added to that award by the court as a matter of law.

purpose of determining compensation and fixes the date from which interest is computed. In *11,000 Acres of Land, More or Less* v. *United States*, 152 F. 2d 566, 568–569 (C. C. A. 5), certiorari denied April 29, 1946, No. 979, October 1945 Term, the court held:

> We regard it as well settled that, either where no declaration of taking is filed or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired. *United States* v. *Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. Ed. 539; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 661; *United States* v. *Rogers*, 255 U. S. 163, 41 S. Ct. 281, 65 L. Ed. 566; Cf. *Olson* v. *United States*, 292 U. S. 246, 54 S. Ct. 704, 78 L. Ed. 1236; *United States* v. *6.87 Acres of Land*, 2 Cir., 147 F. 2d 351.

Cf. *Bank of Edenton* v. *United States*, 152 F. 2d 251 (C. C. A. 4). Relying upon this Court's citation of the Declaration of Taking Act in the *Danforth* case, petitioner Linnenbringer (Br. No. 149, p. 50) asserts that Congress, in that statute, defined a particular act as the taking which would give rise to the right to interest and much of the brief's discussion apparently refers to the date of filing the declaration of taking as the "date of taking" (Br. 35, 39). But the opinion in the *Danforth* case was not considering a situation

where the taking had occurred in actuality prior to invocation of the Declaration of Taking Act. Clearly, in such event, the physical occupancy of the property constitutes the taking. Petitioner Linnenbringer, although recognizing that such is the true date of taking, seeks to ignore it on the ground that now he is only claiming interest from the date the declaration of taking was filed (Br. No. 149, pp. 25–26). Certainly the fact that this petitioner is not now claiming interest between the date of taking possession and the date the declaration of taking was filed does not change the date of taking or enable petitioners to avoid the effect of their contracts. As we have shown (*supra*, p. 19), the contract prices included compensation for the fact that the Government took possession of the property prior to payment.[20] Thus there has been no "taking" under the Declaration of Taking Act.

This is not, as petitioner Linnenbringer asserts (Br. 28) a case where the very purpose of the Declaration of Taking Act is frustrated. On the

[20] In the trial courts, some of the petitioners sought to recover interest from the date of possession or the date of acceptance of the options (see *supra*, pp. 9–10). None of the trial courts allowed interest for a period earlier than the date of filing the declarations of taking (see *supra*, pp. 12–13). The petitioners who prevailed in the trial courts did not cross-appeal on this point. While petitioner Oliver made the contention in the court below (No. 151, R. 71), it is not clear that he is still pressing this view. In any event, it must be rejected on the same principles which require the disallowance of the other petitioners' lesser claims for interest.

contrary, petitioners might have relied upon the Act and the constitutional requirement of just compensation. Instead, as petitioner Oliver recognizes (Br. No. 151, p. 17), they elected to proceed under the contracts which fixed the total amount to be paid including compensation for delay in payment. Having followed that course, petitioners may not, we submit, also take advantage of a portion of the constitutional guarantee of just compensation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the circuit court of appeals should be affirmed.

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JANUARY 1947.

APPENDIX

The pertinent provisions of the Act of July 2, 1917, 40 Stat. 241, c. 35, as amended by the Act of April 11, 1918, 40 Stat. 518, c. 51, 50 U. S. C. 171 are as follows:

> [* * * the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: * * * *And provided further*, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the peti-

tion for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes * * *.

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421–1422, c. 307, 40 U. S. C. 258a–258e, reads as follows:

(SEC. 1) * * * in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right-of-way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon

which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the Chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to ex-

pend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 355, of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

U. S. GOVERNMENT PRINTING OFFICE: 1948

SUPREME COURT OF THE UNITED STATES

Nos. 148, 149, 150, 151 AND 155.—OCTOBER TERM, 1946.

Edgar S. Albrecht and Geraldine Albrecht, His Wife, et al., Petitioners, 148 *v.* The United States of America.	
Edward J. Linnenbringer, Petitioner, 149 *v.* The United States of America.	
Dennis B. Pitman and May Dell Pitman, Petitioners, 150 *v.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, Deceased, et al., Petitioners, 151 *v.* The United States of America.	
Q. W. S. S. Realty and Investment Company, Petitioner, 155 *v.* The United States of America.	

[February 3, 1947.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether the Government is obligated to pay interest in connection with the following land purchase arrangements and condemnation proceedings. The Government made separate contracts with the petitioners to buy certain lands from them to be used for a

public purpose. The contracts stipulated a purchase price to be paid at an indefinite future time when certain conditions had been fulfilled.[1] They also granted the Government the right to immediate possession. Later the Government questioned the validity of the contracts and attempted to rescind them on the ground that by reason of fraud and other things the contract prices were grossly excessive and represented far more than the "just compensation" required by the Fifth Amendment. It filed condemnation proceedings in District Courts under 40 Stat. 241, as amended, 50 U. S. C. § 171, asking the Courts to fix "just compensation" after hearing evidence on that subject. It also filed a declaration of taking under 46 Stat. 1421, 40 U. S. C. § 258a, at the same time depositing in the Courts sums of money, substantially less than the contract prices, which it estimated to be the true "just compensation" for the property taken. The Courts then entered orders divesting the property owners of all title and vesting it in the Government. A companion case in which a District Court held an identical contract valid was appealed and eventually reached this Court. Prior to and pending this appeal these petitioners vigorously asserted the validity of the terms of the contracts which fixed the agreed prices for transfer of possession and title to their properties. Several years later this Court upheld the validity of the identical contract in the companion case.[2] Thereupon the Government, complying with that decision, paid the full contract purchase prices into the

[1] The first contract condition as to payment was that it should be made upon conveyance of a good and merchantable title. The second was that if "for any reason" the Attorney General did not approve the title, the Government could obtain a good title by condemnation proceedings in an appropriate district court, in which event the agreed compensation was to be deposited in court.

[2] *Muschany* v. *United States*, 324 U. S. 49.

District Courts. It prayed that the landowners' compensation be fixed as the contract price without interest. Petioners asserted that they had a right to interest from the time of the "taking" guaranteed by the Fifth Amendment's provision for "just compensation." The Government contended that the "just compensation" provision was not applicable, and that petitioners had no right to interest because their purchase contracts did not provide for it. One District Court decided this question in favor of the Government, 60 F. Supp. 741, but two decided against it. 61 Supp. 199.[3] The Circuit Court of Appeals held for the Government. 155 F. 2d 73, 77. In a case involving somewhat similar facts, *United States* v. *Baugh*, 149 F. 2d 190, the Circuit Court of Appeals for the Fifth Circuit had decided against the Government. Because of the apparent conflict presented and because the question is of widespread importance, we granted certiorari. The facts and issues, so far as we deem them relevant to disposition of all the cases, are identical, and so we consider all of them together.

We agree with the Circuit Court of Appeals that the Government is not obligated to pay interest in these cases. It is true that in cases submitted to them for determination of "just compensation," courts have evolved a rule whereby an element of compensation designated as interest is sometimes allowed. Under this rule, and in the absence of an agreement of the parties fixing compensation, courts first fix the fair market value of property as of the time it is taken. The property owner, against

[3] Some of the petitioners claimed interest from the date the Government took possession of the lands under the contract to the date the Government deposited the full contract price. One petitioner claimed interest only from the date of the filing of the declaration of taking on the difference on that date between the sum the Government deposited as the estimated "just compensation" and the full contract price finally deposited. Interest was awarded by the two District Courts on this latter theory only from the date of the declaration of taking.

whom there is no counterclaim, is always entitled to payment of this much. But where payment of that fair market value is deferred, it has been held that something more than fair market value is required to make the property owner whole, to afford him "just compensation." This additional element of compensation has been measured in terms of reasonable interest. Thus, "just compensation" in the constitutional sense has been held, absent a settlement between the parties, to be fair market value at the time of taking plus "interest" from that date to the date of payment.[4]

But the method used by courts to determine "just compensation" in an adversary proceeding where the parties have failed previously to agree on its amount is not the exclusive method for determining that question. The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. See *Danforth* v. *United States*, 308 U. S. 271. Nor does it bar them from embodying that agreement in a contract, as was done here. And certainly where a party to such a contract stands upon its terms to enforce them for his own advantage, he cannot at the same time successfully disavow those terms so far as he conceives them to be to his disadvantage. That is precisely the position of the petitioners here. They made contracts for the transfer and possession of lands at prices concerning which they have never complained. At the end of prolonged litigation, the Government was barred from showing that compensations fixed by the contracts were not just, but were excessive. Having thus bound the Government to the contract prices as the measure of "just compensation", which prices, to say the least,

[4] *Seaboard A. L. Ry.* v. *United States*, 261 U. S. 299, 306; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 496, 497; *Jacobs* v. *United States*, 290 U. S. 13, 16–17; *United States* v. *Klamath Indians*, 304 U. S. 119, 123.

generously meet the Fifth Amendment's "just compensation" requirement, they now seek to escape the burdens of these identical contract provisions. They invoke the Fifth Amendment in pursuit of something more than the compensation for which their contracts provide—contracts which they are not willing to abandon.

The answer to their contention is that in this posture of the cases these transactions have passed out of the range of the Fifth Amendment. For the reasoning on which interest is added to value as a part of "just compensation" in court condemnation proceedings is not applicable to this situation. That reasoning is that when a court determines just compensation, it first fixes bare value at the time of the taking and adds a sum to compensate for deferred payment of bare value so as to make the property owner whole as required by the Fifth Amendment. We do not think this formula fits contractual arrangements for compensation. Exactly what factors the parties consider, in addition to bare value, cannot easily be ascertained. This very group of transactions illustrates that there may be many such additional factors. For example, all the contracts here provided for immediate Government possession, though none contemplated immediate payments. We cannot know what amounts were added in the bargains to the bare market values as estimated, though unarticulated, allowances for the anticipated delays in payment. And other factors, which need not be enumerated, entered into the contract prices. These things demonstrate the inadvisability of applying a constitutional rule as to interest, specially designed to enable courts to calculate "just compensation," to an entirely different situation in which parties, supposedly with due regard to their own interests, bargain between themselves as to compensation. Since these petitioners have chosen to stand on their contract terms as to the amount they will receive for their property, rather than to have "just com-

pensation," in the constitutional sense, fixed by the courts, we must look to those terms for the measure of their compensation, including their right to that part of compensation which courts have called interest.

We have not overlooked the contention that this conclusion is in conflict with our holding in *Danforth* v. *United States*, 308 U. S. 271. We do not think it is. That was also a case in which a statute authorized Government agents to purchase property, and a price had been agreed on prior to condemnation proceedings. But the asserted interest claim was there denied. The decision in that case reasserted the principle that interest in condemnation proceedings does not begin until there has been a taking. After noting the several incidents asserted to constitute a taking, we held that there was no interval between the taking of the property there and payment for it. Thus the question we have considered here was neither directly involved, raised, nor given special consideration. A further incidental distinction between that case and this is that in the *Danforth* case the contract did not anticipate that the taking would precede payment.

Turning now to the right to interest under the contracts, and apart from the contention regarding the Fifth Amendment, we find that the contracts have no provision for payment of interest. No statute authorizes the payment of interest in cases like this. In the absence of specific contract or statutory provision no interest runs against the Government even though the Government's payment for the contract purchases be delayed. See *Smyth* v. *United States*, 302 U. S. 329, 353; *United States* v. *Thayer-West Point Hotel Co.*, No. 106, O. T. 1946, slip opinion, p. 3; *United States* v. *N. Y. Rayon Importing Co. et al.*, No. 94, O. T. 1946, slip opinion, p. 5–6.

There is some argument that interest should be allowed because the Declaration of Taking Act, 46 Stat. 1421, 40 U. S. C. § 258a, under which condemnation proceedings

were filed, authorizes payment of interest from the date property is taken. *Cf. United States* v. *Thayer-West Point Hotel Co., supra*, p. 3. This provision, however, is no more than a statutory embodiment of the rule for determining constitutional "just compensation" in the absence of a governing contract, and what we have already said is equally applicable to the claim for interest under the statute. It contains no specific provision for interest on Government contracts of purchase. And here, while the litigation was under the condemnation statute, the petitioners' reliance on the purchase price provisions of the contracts as to value took these claims for interest outside the purview of the interest provisions of the Declaration of Taking Act, and left them to be governed by the interest rules which would have applied had suit been brought by petitioners to enforce the contract terms. Petitioners were barred from receiving interest in any proceeding for the reason that their contracts contained no promise to pay interest.

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 148, 149, 150, 151 AND 155.—OCTOBER TERM, 1946.

Edgar S. Albrecht and Geraldine Albrecht, His Wife, et al., Petitioners,
148 *v.*
The United States of America.

Edward J. Linnenbringer, Petitioner,
149 *v.*
The United States of America.

Dennis B. Pitman and May Dell Pitman, Petitioners,
150 *v.*
The United States of America.

A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, Deceased, et al., Petitioners,
151 *v.*
The United States of America.

Q. W. S. S. Realty and Investment Company, Petitioner,
155 *v.*
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 3, 1947.]

MR. JUSTICE REED and MR. JUSTICE DOUGLAS, dissenting.

"The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory." *United States* v. *Baugh*, 149 F. 2d 190, 192. The landowners'

"right to have interest" is found in the Constitution and is neither found nor lost in the contract." *Id.*, p. 193. The justness of the claim for interest in these cases is underlined by the fact that the land was taken over four years before full payment was made. The United States renounced these contracts and retained possession of the properties by the Declaration of Taking Act which by its terms, 46 Stat. 1421, 40 U. S. C. § 258a, entitled the condemnee to interest on the value from the date of taking except as to sums paid into court. After the decision in *Muschany* v. *United States*, 324 U. S. 49, the Government carried out its condemnation suits and obtained titles to these properties by condemnation.

In these condemnation actions the agreed price, stated in the contracts, became the "just compensation" of the Declaration of Taking Act and by that Act interest was due for such amount as had not been deposited with the trial court when the declaration was filed. Interest for the period between the declaration and the payment of the value into the trial court should be allowed on the amount by which the sum fixed in the final decree exceeded the sum deposited with the declaration of taking.